

Spring 2002

Cook County Criminal Law Practice in 1929: A Community's Response to Crime and a Notorious Trial

Thomas F. Geraghty
Northwestern University School of Law

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Thomas F. Geraghty, Cook County Criminal Law Practice in 1929: A Community's Response to Crime and a Notorious Trial, 92 J. Crim. L. & Criminology 555 (2001-2002)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

COOK COUNTY CRIMINAL LAW PRACTICE IN 1929: A COMMUNITY'S RESPONSE TO CRIME AND A NOTORIOUS TRIAL

THOMAS F. GERAGHTY*

I. INTRODUCTION

This paper describes the practice of criminal law in the courts of Cook County in 1929, using a 1929 study of Cook County's criminal justice system and one high-profile case as the basis for that description. The background description of Cook County's criminal justice system and criminal law practice comes primarily from a report written by Chicago's civic leaders in 1929 entitled, *The Illinois Crime Survey* [hereinafter *Survey*].¹ It is a model of a comprehensive study of a criminal justice system. The *Survey* describes the state of the criminal justice system in Cook County, a system that was then perceived to be in crisis as the result of the influences of organized crime, political corruption, and isolation from best practices.

Against this background, I examine the transcripts and documents associated with one trial, *People v. Fisher*.² This case, a bank robbery/murder in which a bank security guard was killed, received front page attention from Chicago's newspapers during 1929 and 1930. All of the defendants were black, as was the victim. Three of

* Professor of Law, Associate Dean, Director Bluhm Legal Clinic, Northwestern University School of Law. I would like to thank Claire Boyle (N.U. 2002), Eloise P. Lawrence (N.U. 2002) and Ashley L. Baynham (N.U. 2004) for their valuable research assistance.

¹ THE ILL. ASS'N FOR CRIMINAL JUSTICE, *THE ILLINOIS CRIME SURVEY* (John H. Wigmore ed., 1929). This study, called the "most ambitious" of its time, was modeled upon the 1925 *Missouri Crime Survey*, which led to the creation of public crime commissions in cities around the United States. RAYMOND MOLEY, *OUR CRIMINAL COURTS* 220 (1930). Moley was one of the authors of *The Illinois Crime Survey*.

² *People v. Fisher*, 172 N.E. 743 (Ill. 1930). This case involved several defendants; Lafon Fisher, Leon Brown, Leonard Shadlow, Melvin Jenkins, Stephen Dixon, and Herbert Hare. Fisher, Brown, Shadlow, and Jenkins were tried together. Herbert Hare was tried separately. Stephen Dixon was apprehended after the others were tried and pled guilty to murder.

the defendants, Shadlow, Brown, and Fisher, were sentenced to death and were executed.³ Defendants Herbert Hare, Steven Dixon, and Melvin Jenkins, were sentenced to life in prison. Hare and Dixon died in prison, Dixon in 1933⁴ and Hare in 1946.⁵ Jenkins was paroled in 1955.⁶ The killing in the Fisher case, while it occurred during the commission of a felony, was not premeditated.⁷

As I investigated the criminal law practice of the 1920's, I was drawn to make comparisons between modern day practice and that of the 1920's. Those familiar with modern day criminal law practice will note the development of the law post-1929 regarding the admissibility and reliability of confessions,⁸ pre-trial publicity,⁹ pre-trial discovery,¹⁰ the law of confrontation,¹¹ prosecutorial ethics,¹² right to counsel and adequacy of defense services,¹³ and issues surrounding the implementation of the death penalty.¹⁴ These "advances" in criminal procedure run counter to many of the suggestions made for reform in the late 1920's. The suggestions made by 1920's criminal

³ See ED BAUMAN, *MAY GOD HAVE MERCY ON YOUR SOUL* (1993).

⁴ Record of the Illinois Parole Board regarding Steven Dixon, July 3, 1930 (on file with the author).

⁵ Record of the Illinois Parole Board regarding Herbert Hare, Dec. 8, 1922 (on file with the author).

⁶ Record of the Illinois Parole Board regarding Melvin Jenkins, June 28, 1929 (on file with the author).

⁷ A review of the abstract of the trial testimony reveals that the bank guard was killed by the robbers after he pulled a gun and advanced toward the gang. By comparison, in an earlier notorious case, Leopold and Loeb, both white and affluent, were given life sentences for a crime that involved kidnapping and killing a young boy. See, e.g., HAL HIGDON, *THE CRIME OF THE CENTURY* 261-70 (1975).

⁸ See *Dickerson v. U.S.*, 530 U.S. 428 (2000); *Miranda v. Arizona*, 384 U.S. 246 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Brown v. Mississippi*, 297 U.S. 278 (1936).

⁹ See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Irvin v. Dowd*, 366 U.S. 717 (1961).

¹⁰ See *Strickler v. Green*, 527 U.S. 263 (1994); *Brady v. Maryland*, 373 U.S. 83 (1963).

¹¹ See *Cruz v. New York*, 481 U.S. 186 (1987); *Bruton v. U.S.*, 391 U.S. 123 (1968).

¹² See ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8. The Illinois version of rule 3.8, unlike the model rule, states that: "(a) the duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict." ILLINOIS RULES OF PROFESSIONAL CONDUCT, Rule 3.8(a).

¹³ See *Strickland v. Washington*, 466 U.S. 668 (1984); *Argersinger v. Humlen*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 355 (1963); *Betts v. Brady*, 316 U.S. 455 (1942).

¹⁴ See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (holding Georgia's death penalty scheme unconstitutional because it created a substantial risk that it would be enforced in an arbitrary and capricious manner); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding the constitutionality of Georgia's new death penalty sentencing scheme that provides carefully drafted standards to govern the application of the death sentence); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding mandatory death for first degree murder unconstitutional).

reform commissions included limitation of the right to jury trial, more joint trials of co-defendants, and permitting comments on a defendant's failure to testify.¹⁵ Comparisons between old and new will reveal that despite the advances made in the development of the law, the modern system of justice relies as much as the old one did on the integrity, skill and vision of those who manage justice, including the police as well as the lawyers and judges who try cases. New constitutional safeguards, while they increase the potential for justice to be done, do not guarantee integrity, fairness, and impartiality. Perhaps the best example of our modern system's shortcomings is the uncovering of many wrongful convictions, particularly in death penalty cases. These wrongful convictions (thirteen in Illinois alone) occurred in the modern day, despite decades of improvements in procedural protections.

An empirical study of the racial composition and economic status of the lawyers, defendants, and judges who have populated the Criminal Court of Cook County is beyond the scope of this essay. However, no one can deny that criminal practice in today's Cook County Criminal Court involves primarily the prosecution and defense of young black men. A substantial proportion of defendants in Cook County have always been designated as indigent.¹⁶ These racial and economic facts affect all aspects of Cook County's past and existing criminal justice system, including the care with which prosecutions were and are conducted, the resources devoted to the defense of criminal cases, and the attitudes and qualities of judges who preside over trials and administer Cook County's courts.¹⁷

¹⁵ MOLEY, *supra* note 1, at 94–100.

¹⁶ In 1923, The Chicago Bar Association's Committee on Defense of Prisoners estimated that "half of those arrested for crimes could not afford counsel." Consequently, volunteers had to be found annually for more than 600 cases. HERMAN KOGAN, *THE FIRST CENTURY, THE CHICAGO BAR ASSOCIATION 1874–1974*, at 166 (1974). By 1947, the Cook County Public Defender was representing almost 1300 defendants per year, over half of criminal cases in Cook County. EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* 201–02 (1951). In 1989, 78% of defendants in local jails around the country had assigned counsel. STEVEN K. SMITH & CAROL J. DEFANCES, *BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE* 4 (1996). In 1996, publicly financed counsel represented 82% of felony defendants in the 75 most populous counties in the U.S. CAROLINE WOLF HARLOW, *BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES* 5 (2000).

¹⁷ To prove this point, as it relates to the present day, a field trip is suggested. Visit the criminal court of Cook County, located at 26th & California. Then visit the Richard J. Daley Center in Chicago's Loop, the Cook County courthouse in which civil cases are heard. Visit the Dirksen Federal Courthouse in the Loop, where both criminal and civil federal cases are heard. Compare and contrast.

In 1929, the "new" criminal court and Cook County Jail and court complex was opened. The *Fisher* case was one of the first tried in that building. One Chicago newspaper noted that the new jail had "1302 cells each with running water and other conveniences."¹⁸ Today, the Cook County Jail complex houses 10,000 inmates.

II. THE CULTURE OF THE CRIMINAL PRACTICE IN THE 1920'S: AN OVERVIEW

I begin with a very brief overview of the criminal practice in the Cook County Circuit Courts during the 1920's. This overview is based primarily upon accounts contained in *The Illinois Crime Survey*.

The *Survey*, initiated by the Illinois State Bar Association and funded by the Industrial Club of Chicago, was a massive undertaking comprising 1100 pages and including detailed statistical analyses of the operation of criminal courts throughout Illinois, as well as the results of observations of the system and interviews of the key participants.¹⁹ Key collaborators included judges, lawyers, academicians, and law enforcement officials.²⁰ The *Survey* included examination of the functions of both the trial and appellate courts, as well as the performance of police, judges, and prosecutors.²¹ In addition, the *Survey* focused on the role of organized crime in Chicago, finding that the courts, prosecutors, and police were too often subject to corrupt influences.²² Although the *Survey* was billed as an objective scientific study of the criminal justice system (which it was), there can be little doubt that the reality of corruption in the system in the 1920's prompted high-minded citizens of Chicago to organize and to back this *Survey* in order to promote the creation of a corruption-free and more efficient system. There are indications that the court system it-

¹⁸ *Complete Plans for Abandoning Old County Jail*, CHI. TRIB., Mar. 1, 1930

¹⁹ See THE ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 1.

²⁰ *Id.*

²¹ Most recently in Cook County, the Chief Judge of the Criminal Court has appointed a Special Prosecutor to look into allegations that, in the 1980's, a particular group of police detectives tortured suspects at Chicago's Area 2 headquarters. *In Re* Appointment of Special Prosecutor, No. 2001 Misc. 4 (Cir. Ct. Cook County April 24, 2002) (Mem. Op. and Order appointing Special Prosecutor). As of the publication of this article, a group of lawyers have sought to disqualify the Office of the State's Attorney of Cook County and all Cook County judges from participation in cases in which defendants allege that they were tortured by Area 2 detectives. Jerry Crimmins, *Sweeping Requested is "Novel,"* CHI. DAILY L. BULL., July 23, 2002, at 3; Steve Mills, *Plea Made for Outside Judges; Request is Filed in Burge Cases*, CHI. TRIB., July 23, 2002, at 1N.

²² THE ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 1, at 815-1087.

self recognized that it was in crisis and sought to publicize the dangers inherent in making the criminal justice system the scapegoat for larger societal problems.²³ Chief Justice DeYoung of the Supreme Court of Illinois noted:

The public has been aroused to support the war to reserve government against the attacks of the anti-social elements. . . . We may expect beneficial results . . . but there is a need for caution that we do not overstep ourselves. There are modern philosophers who are impatient to wipe out the restraints in law that have proved their value through the ages.²⁴

DeYoung also noted that some reformers were calling for abolition of the presumption of innocence and the abolition of the requirement of unanimous verdicts in criminal cases.²⁵

In 1929, leaders of the Circuit Court of Cook County called for the establishment of a specialized criminal court for Chicago cases. Judge Frank Commerford stated:

The criminal court should be a complete unit in itself, and the judges permanently assigned to that work. By that system, the judges would become specialists in criminal work and would be able to speedily dispose of cases. The present system of shifting judges from one branch to another each year does not allow the judge to specialize in criminal law.²⁶

The shooting death of a young prosecutor, who at the time of his death was in the company of known gangsters, was used by the *Survey* as an epiphany—one which characterized the crisis:

(1) that crime was organized on a scale and with resources unprecedented in the history of Chicago; (2) that the leading gangsters were practically immune from punishment; and (3) that the position of power and affluence achieved by gangsters and their immunity from punishment was due to an unholy alliance between organized crime and politics.²⁷

The causes of this “unholy alliance” ran deep. Dean Wigmore described the “larger causes” of the problem:

²³ *Bill Proposes New Criminal Court for Chicago Cases Only*, CHI. TRIB., Jan. 23, 1929, at 4.

²⁴ *Public Awakening to Court Needs, De Young Says*, CHI. TRIB., Jan. 26, 1929, at 14.

²⁵ *Id.*

²⁶ *Bill Proposes New Criminal Court for Chicago Cases Only*, *supra* note 23, at 4.

²⁷ THE ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 1, at 1091.

My guess is that they are all reducible ultimately to one prime cause; and that cause is: the Selfishness of the Ordinary Citizen....

Here is an instance: Some years ago a certain Chief of Police (not the present one), when a friend of mine asked him why a certain desirable measure was not taken by him, replied thus: "I haven't had the time to get at it. *One-half of my day's time is taken up with fending off requests made by all sorts of citizens, from aldermen down, who want me to do something that I shouldn't do or to let them do something that they shouldn't do.*" No doubt every Mayor, every Judge, and every Prosecuting Officer could also tell a similar story.²⁸

The Illinois Crime Survey concluded:

To cope with the problem of organized crime through honest and efficient law enforcement, the police department, the judges, and the courts, and the state's attorney's office must be sustained by the constant force of intelligent public opinion.

To be intelligent, the public must have a continuous supply of reliable information both upon the work of these law enforcing agencies and upon the course of developments in the crime situation. Current newspaper accounts of crime news are insufficient for this purpose. Nor can reliance be placed exclusively upon the Surveys of their own work given out by law enforcing agencies. These are desirable and necessary, but they must take their places in a larger scheme of crime accounting.

It is necessary to devise and institute a comprehensive plan of fact finding and Surveying "to provide the public with authentic information upon the efficiency and integrity of its law enforcing agencies, upon the activities and practices of criminal gangs and gangsters, and upon crime in all its manifestations."²⁹

The *Survey's* credibility was bolstered by its attention to statistical detail. The authors of the *Survey* made their case based upon numbers—numbers of cases brought into the system and numbers of cases diverted out of it. The *Survey* demonstrated that relatively few cases brought into the system were prosecuted to the fullest extent of the law—that is by a trial in criminal court.³⁰ Voluntary dismissals by the prosecution, the *Survey* alleged, were all too common in the sys-

²⁸ *Id.* at 1096 (emphasis added).

²⁹ *Id.*

³⁰ *Id.* at 219.

tem and damaged its effectiveness and credibility. Defendants were too often allowed to plead to lesser charges to avoid felony convictions.³¹

In addition to relying on the numbers, the authors of the *Survey* spent a great deal of time observing practice in the criminal courts—both in the municipal (misdemeanor) courts and in the felony trial courts.³² The observations of practice were made by people with experience in the practice, former prosecutors, judges, and members of the more elite elements of the legal profession.³³ According to the *Survey*, the “branch courts” were in chaos and were run as a business for all concerned.³⁴ Prosecutors stood idly by (working only a few hours a day).³⁵ Defense lawyers openly solicited business, employing various tactics to make cases “go away.”³⁶ The police were often placed in the role of prosecuting cases without the assistance of the prosecutors.³⁷ Judges failed to control their courtrooms.³⁸

It was in the branch courts that many serious cases were dismissed at the preliminary hearing stage before they could be sent on to felony trial courtrooms.³⁹ The *Survey* observed that preliminary hearings—the hearings utilized in the majority of cases to determine whether a case would be tried as a felony—were a sham: “to conclude, the whole proceeding in a preliminary hearing is a mockery of law administration.”⁴⁰ The *Survey* noted that in part because of the chaos and corruption in branch courts, only one in five felony cases filed resulted in a finding of guilty and that “many of the ten thousand who went free are bombers, murderers, robbers, burglars, rapists, desperate men, whose presence is a constant threat to organized society and the security of property.”⁴¹

The State’s Attorney of Cook County had a different take on this problem. He viewed waiving felony prosecutions as a way of reducing the backlog in criminal cases.⁴² The *Chicago Tribune* [hereinafter

³¹ *Id.*

³² *Id.* at 11–21.

³³ *Id.*

³⁴ *Id.* at 393–419.

³⁵ *Id.* at 406–18.

³⁶ *Id.* at 408–10.

³⁷ *Id.* at 406–08.

³⁸ *Id.* at 404–06.

³⁹ *Id.* at 305–08.

⁴⁰ *Id.* at 308.

⁴¹ *Id.* at 295.

⁴² *Swanson Asks His Aids to Use Common Sense*, CHI. TRIB., Jan. 23, 1929, at 2.

Tribune] reported in 1929 that State's Attorney Swanson asked his assistants to use "common sense" in dismissing felonies.⁴³ This was in response to a report from the Judicial Advisory Council "calling attention to the clogging of court calendars because of the failure to waive felonies in any case."⁴⁴ An earlier *Tribune* article called attention to overcrowding of the jail as a result of holding prisoners on felony charges that should have been disposed of as misdemeanors.⁴⁵

In the felony trial courtrooms, a lesser degree of chaos prevailed, but the criticisms leveled by the *Survey* regarding the disposition of felony cases were just as devastating. According to the *Survey*, prosecutors were routinely unprepared for trial.⁴⁶ The *Survey* recommended that prosecutors be assigned to cases instead of to courtrooms to ensure that the prosecutors assigned to the case were prepared.⁴⁷ Voluntary dismissals in the felony trial courts were common, especially dismissals for want of prosecution.⁴⁸ The *Survey* observed:

if the state's attorney is delinquent in such cases and by his inaction permits witnesses to remain away from prosecution in cases in which they are vital assets of the state, and if he permits them to be coerced into remaining away by threats or other means well-known to Chicago's underworld, there is no public agency that can discover his shortcomings.⁴⁹

The *Survey* also noted that the professionals within the system (especially prosecutors) too often blamed acquittal-prone juries for allowing criminals to escape punishment.⁵⁰ The *Survey* demonstrated convincingly that, in fact, juries were not to blame.⁵¹ First, relatively few of the cases charged were eventually tried by juries.⁵² The vast majority of cases were plea bargained for lesser charges or voluntarily dismissed by the prosecution, many because witnesses failed to appear in court.⁵³

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Drive on Felony Waivers Found Slowing Courts*, CHI. TRIB., Jan. 22, 1929, at 6.

⁴⁶ THE ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 1, at 226.

⁴⁷ *Id.* at 226.

⁴⁸ *Id.* at 303-04.

⁴⁹ *Id.* at 303.

⁵⁰ *Id.* at 226.

⁵¹ *Id.* at 228-29.

⁵² *Id.* at 239-40.

⁵³ *Id.* The cause of the failure to convict in felony cases was hotly debated. The Chicago Crime Commission blamed the phenomenon on judges. Judges blamed it on prosecutors.

Prosecutors were not the only object of criticism. The *Survey* also denounced defense lawyers and the appellate courts: "The methods of unscrupulous criminal lawyers were thought to be a large factor in the system's state of disrepair, and responsibility was placed on the appellate courts for reversals on technical grounds that had little to do with the merits."⁵⁴

Defense lawyers who practiced in the misdemeanor courts were described as corrupt.⁵⁵ A passage from the *Survey* paints a colorful and disturbing portrait of the criminal defense lawyer of the 1920's:

Many of the branches of the Chicago Municipal Court seem to tolerate a condition in connection with attorneys for the defense, which is more serious even than the lack of prosecution which has already been described. It seems to be customary for certain lawyers to assume a proprietary attitude toward defense cases. These privileged characters come to the court daily, deposit their coats and hats immediately upon arrival and participate in the activities exactly as if they were paid attendants. They solicit business very largely through the clerks, bailiffs, assistant prosecutors and occasionally through the judges themselves.

They also mingle freely among the unfortunates who are haled before the court and get business first-hand. The continuous presence of such a permanent defense lawyer in the court room means that pleasant and sometimes profitable relationships are established between him and court attaches. Such lawyers have been known to divide the profits from their activities with the kindly officers who throw business to them. In fact, it is stated on good authority that occasionally such a privileged position in a given branch court is paid for by the lawyer, either on a percentage basis or as an initial fee, for the privilege of preying upon the victims of that particular neighborhood. The names of such men who operate in a given court are not difficult to secure—in fact the *Survey* has practically a complete list of the "regulars."

The criminal branches of the Municipal Court have at least one and some have two or three of these "regular" attorneys. Harrison Street has about seven. The ease with which they secure favors in a given court and the greater degree of success which they seem to have in their cases indicates the presence of what maybe a well defined "ring" within certain courts, or what may be a less definite, but nevertheless potent, understanding between them and the officials of the court. Where such a

See Mark H. Haller, *Urban Crime and Criminal Justice: The Chicago Case*, 57 J. OF AM. HIST. 619 (1964).

⁵⁴ *Id.* at 202.

⁵⁵ *Id.* at 408-410.

"ring" is in existence the defense lawyer holds his status by giving favors, if not money, to those who assist him.

The presence of these men and the dubious relationships which they have with court officials suggests a condition which is dangerous and reprehensible in the extreme. It is probable, however, that the situation cannot be met by direct negative action. In other words, it might be possible to drive out of the court room certain of these parasites but their function would be fulfilled in some other way. We may as well face the fact that these men are fulfilling a necessary function in the court but in a very objectionable manner, and under a status that is highly undesirable.

It is quite possible that some modified form of the public defender system would be helpful in ridding the Municipal Court of the undesirable aspects which we have described. An office might be created under the jurisdiction of the chief justice to defend the indigent and to institute a system of inspection throughout the branches of the court for the purpose of eliminating the solicitation of business by certain lawyers also to advise all defendants as to their rights and duties in the employment of counsel and the compensation thereof.⁵⁶

The chairman of the Chicago Bar Association's Sub-Committee on the Establishment of a Public Defender System described lawyering in the felony courts in an equally uncomplimentary way:

Many of the attorneys who seek assignment [of felony cases] are of the undesirable type who accept such cases only for the possible fee they can extract from the defendant or his relatives. With this in mind, instead of seeking a prompt trial, they continue the case and drag it out as much as possible, thus congesting the criminal court calendar with numerous old cases that should have been disposed of. If they find that no fee can be gotten they will frequently lose interest in the case and either persuade the defendant to plead guilty when in fact the defendant should not plead guilty, or they will make only a perfunctory defense. On the other hand, if they succeed in getting the fee, only too often will they connive with the defendant and fabricate an unethical defense.⁵⁷

⁵⁶ THE ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 1, at 408-10. *But see* Haller, *supra* note 53, at 625. ("The attorneys and law professors who were the reformers had little in common with the lawyers who practiced criminal law; indeed, they often did not bother to conceal their contempt for the training and ethics of the lawyers who practiced regularly in the criminal courts.") (citation omitted).

⁵⁷ Charles Mishkin, *The Public Defender*, 22 J. CRIM. L. & CRIMINOLOGY 489, 496 (1931).

As a result of the continuing criticism of the fairness and efficiency of the Cook County Criminal Courts, a Public Defender was appointed in 1930.⁵⁸

During the 1920's, decades prior to the *Gideon* case, the legitimacy of the Cook County courts was attacked on two fronts. Judges, prosecutors, and police were charged with closing their eyes to the activities of gangsters—and thus with failing to effectively enforce the laws and prevent crime. At the same time, many charged that judges, prosecutors, and private defense lawyers were indifferent to the rights of the poor: relatively innocent folk who found themselves in trouble with the law were apt summarily to receive more punishment than they in fact deserved.

Although the Cook County public defender was hired to represent indigents, it is clear from historical accounts that the office was created more to serve the needs of the courts than to serve those of defendants. The courts accepted the public defender as a way to make the system seem more efficient, more fair.⁵⁹

The *Survey* did not limit its critique of the criminal justice system to judges and lawyers. It also criticized police practices—both corruption and over-zealousness and the extent to which they were tolerated by prosecutors and judges.⁶⁰ In particular, the *Survey* criticized the practice of relying upon coerced confessions to solve crimes.⁶¹ The *Survey* noted that police, “criticized for their inability to discover the perpetrator of a particular crime, scolded by the press and the public, and smarting under criticism of failure, have resorted to the ‘third degree’ and other improper and dishonest police methods.”⁶² The *Survey* went on to note that:

a confession so obtained is worse than useless. Relying upon its sufficiency to secure a conviction, the police abandon all effort to obtain further proof. Its rejection by the court leaves the prosecuting officer

⁵⁸ LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 38–39 (1989). The Public Defender filed his first report in November, 1930. In that report, the public defender stated that the office represented “60 percent of all cases arraigned before the criminal court because the defendants lacked funds to employ counsel.” CHI. DEFENDER, Nov. 8, 1930 at 2.

⁵⁹ MCINTYRE, *supra* note 58, at 44.

⁶⁰ THE ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 1, at 289–92, 357–76.

⁶¹ *Id.* at 290–91. This problem has persisted. Four death row inmates who claimed that their confessions were the product of police torture were recently pardoned. See Steve Mills & Maurice Possley, *Ryan to Pardon 4 on Death Row; Men Say They Were Tortured by Chicago Police*, CHI. TRIB. Jan. 10, at 1.

⁶² *Id.* at 289.

without any evidence to support the charge. The public, in the meantime, is unable to understand how a self-confessed criminal goes free. Such an educational process (educating police that unlawful means cannot be tolerated) will doubtless be of slow growth, but with the right kind of effort it will not be difficult to establish the same public confidence in the truth of a policeman's testimony as that which now prevails in England and other European countries.⁶³

III. PEOPLE V. FISHER

The trial of the *Fisher* case was conducted within the system described by the *Survey*. The lawyers involved in the case, both prosecution and defense, displayed skill and dedication. The defense lawyers, in particular, fought with remarkable zeal to save their clients' lives in the face of overwhelming odds. The defense team consisted of John Fogle on behalf of Leonard Shadlow, Richard E. Westbrooks on behalf of Leon Brown, and Joseph Lofton on behalf of Lafon Fisher.⁶⁴ Herbert Aschin represented Melvin Jenkins. The prosecutors were Charles A. Bellows (who later became one of Chicago's leading defense lawyers) and C. Wayland Brooks (who later became a United States Senator from Illinois). Judge Robert Gentzel presided over the trial.⁶⁵ No doubt, the *Fisher* case was not the "run of the mill" felony described in the *Survey*. A review of the trial record reveals that there was a pool of able and dedicated defense lawyers who, in the highest tradition of the legal profession, were not afraid to take on an unpopular case.⁶⁶

A. THE ROBBERY

On January 18, 1929, at 1:00 p.m. in the afternoon, five men entered the Franklin Trust and Savings Bank on the south side of Chicago. They were armed with pistols and a shotgun. A holdup was announced. One of the robbers vaulted over the cashier's cage and began to scoop up money. On duty that day at the bank as a security guard was Marvin French, a retired Chicago police officer. French pulled his gun. There was an exchange of gunshots. Twenty shots

⁶³ *Id.* at 291.

⁶⁴ Supreme Court of Illinois, *People v. Fisher Abstract of Record*, Nov. 16, 1929 at 1-5 (on file with author) [hereinafter *Abstract*].

⁶⁵ *Id.*

⁶⁶ Lofton and Westbrooks were court-appointed. Their petition for fees notes that they spent 11 full days in trial, in excess of 5 days preparing for trial, at least 5 days on post trial motions. Each lawyer asked for fee of \$250.00. Petition for Fees (on file with the author).

were fired. French was mortally wounded, two bank employees suffered gunshot wounds, and the robbers fled the bank carrying with them approximately \$2000.⁶⁷

B. THE INVESTIGATION

The police responded to the scene quickly and a manhunt for the robbers began. The investigation led to the discovery of a "Negro Crime Headquarters," from which twenty-three prisoners, "every one an ex-convict — will be identified for other crimes," were taken into custody.⁶⁸ The investigating detective "had been told of a place where Negro ex-convicts congregated and where they planned their crimes."⁶⁹ The *Tribune* reported on January 20, 1929, that in a room at that address, the police found four men and \$200, the "bills being identified by the serial numbers as part of the loot of the Franklin Bank."⁷⁰ The *Tribune* reported on January 21, 1929, that Leonard Shadlow, the purported leader of the robbery gang, and "nineteen other colored desperados were captured in a police raid at 3341 South Wabash Avenue."⁷¹

Among the men taken into custody at 3341 South Wabash were Leonard Shadlow, Leon Brown, Lafon Fisher, and Melvin Jenkins. Police remained at the Wabash address on the lookout for Herbert Hare, reputed to be the "director general" of the alleged robbers' den.⁷² Police were also on the lookout for Steve Dixon, the alleged mastermind of the robbery.⁷³

The *Tribune* went on to report that after his arrest, Shadlow agreed to make a statement "if he could get immunity":

Deputy Stege communicated with Commissioner of Police Russell and State's Attorney Swanson and they went to Stege's office for a consultation. Stege announced afterwards that he had promised Shadlow he would try to save his life, saying he could do that conscientiously, inasmuch as Shadlow had no part in the actual shooting.

⁶⁷ *Seize 23 in Robbers' Lair: Caught in Raid, Admit Murder and Holdup*, CHI. TRIB., Jan. 20, 1929, at 1.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Second Murder Charge Made Against Bank Robbery Chief*, CHI. TRIB., Jan. 21, 1929, at 1.

⁷² *Id.*

⁷³ *Id.*

Shadlow said that the robbery was planned by Hare, a rooming house keeper, who sent all roomers out on crime jobs and then shared the proceeds with them. If he didn't get money from them that way, Shadlow said, Hare charged them high rent for the rooms.⁷⁴

According to the *Tribune's* account of what Shadlow allegedly told police, Dixon called Shadlow to the Wabash address. Fisher was in charge of the planning of the robbery. Fisher told Shadlow to drive and to remain outside with the car running.⁷⁵ Dixon was given the shotgun and was told to announce the holdup.⁷⁶ Jenkins was to stay at the door and not let anybody out. According to the *Tribune*, in Shadlow's first statement to police he said that he was outside the bank when the shots were fired.⁷⁷ Brown, Fisher, and Dixon were inside the bank.⁷⁸

The *Tribune* reported that Fisher gave police and prosecutors a different account of the robbery. According to Fisher, Shadlow fired the fatal shots that killed French, and Shadlow was the leader of the conspiracy.⁷⁹ Fisher also told police that Shadlow was the leader of the group. The shotgun used in the robbery was found in the car used in the robbery. The car was found abandoned not far from where the robbery occurred.⁸⁰ Jenkins took police to where a .45 caliber pistol was found.

The same *Tribune* article that detailed the investigation of the crime and the arrest of the suspects also carried the official records of the defendants' criminal convictions. (Shadlow: three years in the Missouri Penitentiary for robbery; Fisher: not guilty of robbery, two years in the Penitentiary for armed robbery, returned to prison for violation of parole for twenty-six robbery charges and one assault to kill, sent to Joliet Penitentiary for robbery; Brown: five years in the

⁷⁴ *Id.* (The prosecutors would later contend at the trial of Fisher, Brown, Shadlow, and Jenkins that Shadlow fired the fatal shot. In papers submitted to the Parole and Pardon Board in connection with Dixon's commitment to the penitentiary, the prosecutors stated that Dixon was the shooter. See Letter from John A. Swanson, State's Attorney of Cook County, to Henry C. Hill, Warden, State Penitentiary of Illinois (July 1, 1930)(on file with author)).

⁷⁵ *Second Murder Charge Made Against Bank Robbery Chief*, *supra* note 71, at 1.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

Missouri State Penitentiary for robbery; Jenkins: served four months in Detroit for selling narcotics.)⁸¹

All four defendants gave statements to the police. After giving those statements, witnessed by persons who had allegedly observed the robbery,⁸² Fisher, Brown, Shadlow and Jenkins were taken to the Franklin Bank and Trust to re-enact the crime. This re-enactment was front-page news.⁸³

A review of the trial record and other documents in the case reveals considerable confusion over one key fact. The State's theory at the trial of Fisher, Shadlow, Brown, and Jenkins was that Shadlow was in possession of the sawed off shotgun⁸⁴ and that Shadlow fired the shotgun at French, mortally wounding him.⁸⁵ The Supreme Court of Illinois, in reviewing the convictions of Fisher, Shadlow, and Brown, noted that John E. Geraghty, a patron of the bank who witnessed the robbery, identified Shadlow as the robber who had the shotgun.⁸⁶ Leo Pocquette, an employee of the bank who exchanged gunshots with the robbers, and who was shot in the foot during the holdup, testified that Shadlow had the shotgun.⁸⁷ So did an employee of the bank, Alexander McKay.⁸⁸ Another employee of the bank, Walter Lorenze, testified that Shadlow had a pistol.⁸⁹

The defendants and several witnesses, in their statements to the police, put the shotgun in the hands of Steven Dixon, who managed

⁸¹ *Id.*

⁸² *Id.* (Reporting that "Dr. John Roy French, Dr. Robert McEwen, and John Geraghty, a coal dealer, witnessed the signed confessions of Shadlow and the others. Deputy Stege explained he took the precaution to prevent repudiation of the confessions later. Numerous photographs also were taken of the prisoners by official police photographers thus establishing a precedent in the handling of criminal cases, Deputy Stege declared").

⁸³ *Id.*

⁸⁴ See *Abstract, supra* note 64, Letter from State's Attorney to Board of Pardon and Paroles Regarding Fisher, Shadlow, Brown, and Jenkins (Apr. 9, 1930) (on file with author); Letter from Stephen Dixon (on file with author).

⁸⁵ In reviewing the convictions of the defendants, the Supreme Court of Illinois, in its narrative of the facts, stated: "Evidence showed that [French's] death was caused by two loads from a shotgun in the hands of one of the robbers." *Fisher*, 172 N.E. at 746.

⁸⁶ *Id.*

⁸⁷ See *Abstract, supra* note 64, at 215. Mr. Poquette testified that after he was shot, he was taken to the hospital. The defendants were brought to him and he allegedly identified Shadlow as the man with the shotgun only after Shadlow was told to say "stick 'em up" and was told to hold the shotgun. Before Shadlow was ordered to speak and to hold the shotgun, Poquette told the police only that Shadlow's "face looked familiar, but I wasn't sure of his identity . . . but as soon as he opened his mouth, I recognized him." *Id.* at 215.

⁸⁸ *Id.* at 160.

⁸⁹ *Id.* at 210.

to escape arrest until after the others were tried.⁹⁰ Robert McEwen, a dentist who worked above the bank, looked out his window after he heard gunshots and saw a man with a shotgun walk out of the bank. His description of the man with the shotgun fit Dixon, not Shadlow.⁹¹ Moreover, McEwen testified that the man with the shotgun was wounded, with blood on his face.⁹² It was undisputed that the only robber who was injured was Dixon. McEwen identified Brown and Fisher as the men he saw coming out of the bank with the man with the shotgun.⁹³ Brown had a pistol.⁹⁴ At the trial of Shadlow, Brown, Jenkins, and Fisher, McEwen testified that he did not see the man with the shotgun in the courtroom.⁹⁵ Shadlow was in the courtroom; Dixon had not yet been apprehended.

When Dixon was arrested, after the trial of Fisher, Shadlow, Brown, and Jenkins, Dixon confessed to being in possession of the shotgun. Moreover, the State's Attorney in his letter to the Warden of Joliet that accompanied Dixon to prison, stated that Dixon had the shotgun.⁹⁶ However, in the Fisher trial, the State argued that Shadlow had the shotgun (the State claimed in its closing that five witnesses claimed that Shadlow had the shotgun).⁹⁷ One of the prosecutors in the case, C. Wayland Brooks,⁹⁸ argued in closing that the credibility of the prosecution was enhanced by the fact that the State had called five witnesses who testified that Shadlow had the shotgun and one who said that Dixon had the shotgun.⁹⁹ Brooks seemed to concede that Dixon fired the shotgun, but at the same time suggested that the

⁹⁰ *Id.* at 296, 303, 312, 322.

⁹¹ *Id.* at 220.

⁹² *Id.* at 246.

⁹³ *Id.* at 221.

⁹⁴ *Id.*

⁹⁵ Another fact that confirms that Dixon, not Shadlow, had the shotgun was that John French, the nephew of the victim Martin French, testified that he spoke to Shadlow at the police station. Shadlow told French that he remained on the scene and saw his uncle being placed on the stretcher. *Id.* at 248. Officer Barry, who found the car that had been used in the robbery, testified that when he found the car shortly after the robbery, the shotgun was in the car. *Id.* at 257, 246.

⁹⁶ Letter from John A. Swanson, State's Attorney of Cook County, to Henry C. Hill, Warden, State Penitentiary of Illinois, *supra* note 74.

⁹⁷ *Abstract, supra* note 64, at 472.

⁹⁸ C. Wayland Brooks, a 1926 graduate of the Northwestern University School of Law, later became a United States Senator from Illinois, serving from 1940 to 1949.

⁹⁹ *Abstract, supra* note 64, at 472.

shotgun might have been given to Shadlow by Dixon after the first shot was fired.¹⁰⁰

In all statements concerning the case filed with the Board of Pardon and Parole regarding Shadlow, Brown, Jenkins, and Fisher, the State asserted that Shadlow killed French.¹⁰¹ One observer noted that after Dixon was arrested, the State's Attorney and Dixon's lawyers moved quickly to arrange a plea for Dixon in return for a life sentence.¹⁰² Dixon was then whisked out of town in order to avoid the publicity that his admission, inconsistent with the State's theory at trial, might cause.¹⁰³

C. THE DEFENDANTS' STATEMENTS

The defendants were not given access to their confessions until they were introduced at trial, nor were they permitted to challenge the introduction of their statements before trial. In response to the defendants' request that they be allowed access to their statements before trial, the judge ruled that he had no power to "direct the state's attorney to give up any of his exhibits before they are offered."¹⁰⁴

1. *Hearing on Motion to Suppress Confessions*

Initially, the judge was content to allow the State to refer to the confessions in opening statements before their admissibility was ruled upon. The defense talked him out of this, and so after the trial began, when the State sought to offer the statements into evidence, the judge held a hearing outside of the presence of the jury to determine whether the statements were admissible.¹⁰⁵ As noted above, the State had already let the community know about the facts and contents of the confessions through the newspapers.¹⁰⁶

¹⁰⁰ *Id.* at 475.

¹⁰¹ See, e.g., Letter from John A. Swanson, State's Attorney of Cook County, to the Division of Pardons and Paroles (Apr. 9, 1930) (on file with author) (stating "Shadlow, Brown, and Dixon entered the bank, and Jenkins remained at the door. At a signal their guns were drawn, and Shadlow brandished his sawed-off shotgun . . . Shadlow, who had a sawed off shotgun shot him [French] once in the arm, shot him again in the leg, making a hole as big as a water glass . . .").

¹⁰² Petition to Commute the Sentence of Death Imposed by the Criminal Court of Cook County, Ill. Upon Leon Brown to Life Imprisonment, Dec. 13, 1930 (on file with author).

¹⁰³ *Abstract*, *supra* note 64, at 337-42.

¹⁰⁴ *Id.* at 98.

¹⁰⁵ *Id.* at 60-148.

¹⁰⁶ *Seize 23 in Robber's Lair*, *supra* note 67; *Second Murder Charge Made Against Bank Robbery Chief*, *supra* note 71; *Two Murders Laid at Door of Bandit Leader*, CHI. TRIB., Jan.

a) How the Statements Were Obtained: The Defendants' Versions

Shadlow, the first defendant to make a statement to the police, testified that he was slapped and kicked before he confessed.¹⁰⁷ In his first statement to the police, Shadlow claimed that he was the driver of the car and that he did not enter the bank.¹⁰⁸ In his first statement, he also told the police that Dixon got out of the car with the shotgun.¹⁰⁹ Six hours later, the police elicited another statement from Shadlow. In this statement, Shadlow stated that he went into the bank with a pistol. However, he continued to assert that Dixon had the shotgun.¹¹⁰ He saw "Shorty" (Dixon) fire the shotgun at French.¹¹¹ Shadlow was treated at the Cook County Jail for a bruised neck.¹¹²

Shadlow testified that before he gave his statement, he asked John Stege, the Chicago Police Commissioner, for a lawyer. This request was corroborated by one of the police officers who arrested Shadlow.¹¹³ Commissioner Stege denied, however, that Shadlow asked for an attorney.¹¹⁴

Shadlow testified that he told Commissioner Stege, "if you get me an attorney, I'm ready to tell the truth."¹¹⁵ According to Shadlow's testimony, Commissioner Stege asked Shadlow if speaking to the State's Attorney would be "all right."¹¹⁶ Shadlow, undoubtedly confused about the role of the State's Attorney, said "yes." The Commissioner called the State's Attorney, John Swanson. Swanson sent an assistant State's Attorney, Charles Bellows, to interview Shadlow.¹¹⁷ Shadlow, perhaps thinking that the State's Attorney

21, 1929, at 3; *Guard, Shot by 3 Bank Robbers, Dies: Two Wounded*, CHI. TRIB., Jan. 19, 1929, at 3.

¹⁰⁷ *Abstract, supra* note 64, at 140-41.

¹⁰⁸ *Id.* at 310.

¹⁰⁹ *Id.* at 311.

¹¹⁰ *Id.* at 316.

¹¹¹ *Id.* at 316.

¹¹² A letter in the files of the Parole and Pardon Board filed on behalf of Shadlow's co-defendant, Leon Brown, stated that "Shadlow was knocked out by having two tables turned so that their edges caught him at the sides of the neck, and then forced together until he became strangled." Letter from Chester Rosborough to Parole and Pardon Board (July 8, 1930) (on file with author). See *Abstract, supra* note 64, at 141.

¹¹³ *Id.* at 67.

¹¹⁴ *Id.* at 80.

¹¹⁵ *Id.* at 71.

¹¹⁶ *Id.* at 67.

¹¹⁷ *Id.* at 78.

would protect him, conferred with the State's Attorney and then reportedly confessed to the crime.¹¹⁸

Lafon Fisher testified at the hearing held outside the presence of a jury that a police detective slapped him and kicked him in the shins after he refused to make a statement and after Commissioner Stege¹¹⁹ told him that the others "are squawking."¹²⁰ Fisher was then taken into a small room where he was beaten and hit with a blackjack. Fisher testified that, "when I couldn't stand it any longer I said I would go before the state's attorney and implicate myself and the others in the robbery."¹²¹ Fisher testified that he was told what to say and that after the statement was given, he refused to sign it.¹²²

When Fisher was brought before Commissioner Stege to sign his statement, there were witnesses present, including bank employee Alexander McKay. Mr. McKay testified that Fisher was asked to make a statement in the presence of witnesses and that he refused to

¹¹⁸ Interestingly, the Supreme Court of Illinois' review of the convictions of the defendants does not mention Shadlow's claim that he asked for a lawyer and that he was persuaded to make a statement after the police offered to allow Shadlow to speak to the State's Attorney. See *Fisher*, 172 N.E. 743, 746. This omission is undoubtedly due to the fact that the Court's inquiry focused on the voluntariness of the confession — not whether any of the defendants had been tricked into confessing. *Abstract, supra* note 64, at 78.

¹¹⁹ John Stege was an experienced police investigator who pursued Al Capone during Prohibition years. See generally, JOHN KOBLER, *CAPONE: THE LIFE AND WORLD OF AL CAPONE* (1971).

¹²⁰ *Abstract, supra* note 64, at 102.

¹²¹ *Id.* at 103.

¹²² In his affidavit in support of his motion for a severance of his trial from those of the other defendants, Fisher stated that he was

beaten and tortured by certain police officers until he could no longer endure the suffering. He also stated in his affidavit that he told one of the police officers that he would make a statement if taken before Mr. Charles A. Bellows, Assistant State's Attorney; that he was shown a typewritten statement purporting to have been signed by Leon Brown, by said officers; that he was then taken by said police officers to a room where the aforesaid Charles A. Bellows was present with a stenographer and other persons believed by this affiant to be newspaper reporters; that he made a false statement to the said Charles A. Bellows, which statement was made by this affiant for the sole purpose of avoiding further beating and torture at the hands of the said police officers.

Motion for Severance Filed by Lafon Fisher (Apr. 8, 1929) (on file with author). Fisher also stated in this affidavit that he participated in the re-enactment of the crime at the Franklin Bank and Trust because he was threatened with further physical violence. *Id.* In a letter to the Board of Pardon and Parole, dated July 8, 1930, Chester R. Rosborough, identified as a "white minister" from the Moody Bible Institute, stated that he had information indicating that "Fisher was handcuffed at the wrists and again around the ankles and then hung upon a hook or peg, head downward until he was ready to tell what the officers wanted to get." Letter from Chester R. Rosborough to the Board of Pardons and Paroles (July 8, 1930) (on file with author).

do so, telling Commissioner Stege that he had already made a statement.¹²³ Fisher also testified that Leon Brown, who told the police that he couldn't read or write, was asked by detectives to adopt his (Fisher's) statement.¹²⁴ In fact, Fisher's statement, a copy of which is in the appellate record and in the records of the Board of Pardon and Parole, contains a handwritten printed notation, "L. Brown."¹²⁵ Brown's own statement reflects a signature of Leon Brown that is in script, completely different from that of the printed "L. Brown" on Fisher's statement.¹²⁶

Leon Brown, who Dixon later testified at trial had nothing to do with the robbery,¹²⁷ testified at the mid-trial hearing on the defendants' motion to suppress that he was beaten after he was taken into a room in which the co-defendants were present. He said that after his arrival at police headquarters, Commissioner Stege told him that the

¹²³ *Abstract, supra* note 64, at 182.

¹²⁴ *Id.* at 106.

¹²⁵ Statement of Lafon Fisher (Jan. 19, 1929) (on file with author).

¹²⁶ *Id.* at 316.

¹²⁷ Steve Dixon was apprehended in Mississippi in April of 1930 after the trial of Shadlow, Fisher, Brown, and Jenkins was completed. Shortly after his arrest, Dixon pleaded guilty and was sentenced to natural life in prison. Dixon admitted having the shotgun and signed a confession in which he admitted firing the shot that killed Martin French. Letter from John A. Swanson, State's Attorney of Cook County, to Warden of the Illinois State Penitentiary (July 1, 1930) (on file with author); Letter from Chester R. Rosborough to Board of Pardons and Paroles (July 8, 1930) (on file with the author). In his letter of July 1, 1930 to the Warden, State's Attorney Swanson stated that French's death was "caused by shotgun wounds discharged from the hand of Steve Dixon . . ." *Id.*

As noted above, this was contrary to what the State argued at the trial of Shadlow and his co-defendants. At that trial, the State argued that Shadlow fired the fatal shots. On June 28, 1930, after he pleaded guilty to the charge and was imprisoned, Dixon wrote a letter to the Governor of Illinois pleading for Leon Brown's life, stating that Brown was innocent. Letter from Steven Dixon to Governor Louis Emmerson (July 1, 1920) (on file with author). Brown's case attracted considerable attention as his execution approached. An article in the September 27, 1929 *Chicago Defender* stated, "Mr. Rosborough, a white minister of the Moody Bible Institute appeared before the board and told the members that he had personally interviewed Dixon and that Dixon had confessed, and that he, Dixon, had the shotgun from which were fired the fatal slugs that caused the death of French At least 50 persons appeared on behalf of the condemned youths. They were all prominent Chicagoans. Among them was Mrs. Ida Wells-Barnett, prominent clubwoman. One group chartered a special Greyhound bus." *Bank Bandits Lose Appeal; to Die Friday, Oct. 3, CHI. DEFENDER* Sept. 27, 1930, at 1. Despite the efforts of a group of concerned citizens who argued that Brown was innocent, Brown was executed on November 28, 1930. A document in the files of the Parole and Pardon Board, dated October 2, 1930, written by Mrs. D. E. Norman of the Hope Haven League, states that Shadlow told her that Brown was not involved in the robbery. Letter from D. E. Norman to Illinois Parole and Pardon Board (Nov. 11, 1926) (on file with author). Brown, who testified at trial against the advice of his lawyer, presented an alibi. *Abstract, supra* note 64, at 393. He was the only defendant who testified.

others had identified him. Brown denied that he was involved.¹²⁸ Brown was taken to Shadlow, who Brown said, “did not look the best.”¹²⁹ According to Brown, Shadlow identified him as having been involved in the robbery. Brown was again asked by police officers if he “was ready to kick in.”¹³⁰

Brown was then taken before Jenkins who implicated him. Brown was asked again if he was ready to confess. He refused to make a statement.¹³¹ He was taken before Fisher who identified him as a participant in the robbery. Brown persisted in his refusal to make a statement.¹³² Brown testified that he agreed to make a statement only after he was hit on the elbow with a gun and hit on the back with a blackjack.¹³³ Commissioner Stege also participated in the beating.¹³⁴ He saw Lafon Fisher, who appeared to be injured. Brown was asked if he wanted to go through what Fisher had just gone through.¹³⁵ According to Brown, Fisher “didn’t look good.”¹³⁶ After being beaten, Brown agreed to make a statement. He was taken to see an Officer Cusak. Brown testified that he was told what to say.¹³⁷

During his testimony at trial, Brown stated that immediately upon his arrest, he asked Lt. Barry for an attorney.¹³⁸ Brown testified that he was given Lafon Fisher’s statement to read and that Cusak guided his hand as he printed, “L. Brown” on Fisher’s statement. Brown testified that Cusak told him what to say and how to act before Brown was interviewed by Commissioner Stege.¹³⁹ Brown also testified that he did not make the statements attributed to him in the statement that he was forced to sign.¹⁴⁰

Brown testified that when he was taken before Commissioner Stege, he agreed to sign a statement in his own handwriting. Brown

¹²⁸ *Abstract, supra* note 64, at 402.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 119, 403.

¹³² *Id.* at 404.

¹³³ *Id.* at 121, 404.

¹³⁴ *Id.* at 404.

¹³⁵ *Id.* at 405.

¹³⁶ *Id.* at 121.

¹³⁷ According to Brown, Cusak said, “Listen, do you know this is Commissioner Cusak talking to you. I am known to make them talk regardless of whoever they are . . . I have made wops talk tougher than you will ever be.” *Id.* at 405.

¹³⁸ *Id.* at 400.

¹³⁹ *Id.* at 407.

¹⁴⁰ *Id.* at 414–15.

testified that he did so thinking, "maybe if I sign this paper in my own handwriting I can tell it in a nice, decent way, the other one was through force, that is why I signed it."¹⁴¹ Brown testified that he responded to the leading questions of Commissioner Stege and the other police officers who were present.¹⁴² After he signed the statement, a photographer took a picture of Brown holding a pencil.¹⁴³

Herbert Hare, in whose house the robbery was allegedly planned, and who provided the weapons used in the robbery, was granted a separate trial.¹⁴⁴ He was found guilty and was sentenced to life in prison in a trial that was severed from that of Fisher, Shadlow, Brown, and Jenkins. In a handwritten statement made to the prison authorities when he was committed to the penitentiary, Hare stated that he was innocent and that "any lawyer know [sic] how they get confessions in Chicago. What they put me through, I could not stand"¹⁴⁵ Hare did not testify at the hearing on the admissibility of the confessions of Fisher, Shadlow and Brown.¹⁴⁶

b) How the Statements Were Obtained: The State's Version

The Assistant State's Attorneys and police officers who were present during the taking of the statements from the defendants took the stand and denied any misconduct. Although Officer Barry, the policeman who arrested Shadlow, testified that Shadlow asked for a lawyer¹⁴⁷ when he was taken to see Police Commissioner Stege,¹⁴⁸ Barry denied that there was any abuse of Shadlow or of any of the other suspects.¹⁴⁹ Barry testified that Stege asked Shadlow if speaking to the State's Attorney would be all right.¹⁵⁰ According to Officer Barry, Shadlow said "yes" and then, while Stege called the State's

¹⁴¹ *Id.* at 407.

¹⁴² *Id.* at 408.

¹⁴³ *Id.*

¹⁴⁴ See *id.* at 36 (Hare granted separate trial); Letter from John Swanson, State's Attorney, to Hon. Elmer J. Green, Warden, State Penitentiary (June 7, 1929) (on file with author) (giving details on Hare's involvement).

¹⁴⁵ Records of the Board of Pardon and Paroles (Dec. 10, 1929) (on file with author).

¹⁴⁶ See *Abstract*, *supra* note 65. It is noteworthy that Jenkins did not join his co-defendants' motion to suppress their statements, nor did he testify about the circumstances under which his statement was taken. This may have been because, unknown to his co-defendants, Jenkins had arranged to plead guilty and to become a de facto witness against the others through his testimony. See *infra* Part III. F.

¹⁴⁷ *Abstract*, *supra* note 64, at 67, 259.

¹⁴⁸ *Id.* at 67.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Attorney, Shadlow admitted to him that he had been in the bank and named Jenkins, Brown, Fisher, and Dixon as his accomplices.¹⁵¹ After Shadlow confessed, Melvin Jenkins was brought in to see Stege. Fisher and Brown were interviewed by Lt. Cusak after Shadlow and Jenkins confessed.¹⁵²

Officer Cusak testified that Fisher showed no hesitancy in speaking to him. According to Cusak, "[Fisher] said he was in it."¹⁵³ Stege then brought Brown in to see Cusak saying, "Here's another fellow. I wish you would take his statement."¹⁵⁴ Cusak testified that he told Brown, "[I]n order to save a lot of unnecessary writing, we will read [Fisher's] statement, and if there is anything that is not right, you tell me."¹⁵⁵ According to Cusak, Brown read the statement that Fisher had given and signed it, stating that Fisher's statement was true, except for Fisher's statement regarding how long Fisher and Brown had known each other.¹⁵⁶ Officer Dawe was present when Fisher and

¹⁵¹ *Id.*

¹⁵² *Id.* at 72.

¹⁵³ *Id.* at 92.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 93.

¹⁵⁶ At this point in the proceedings, Brown's attorney made a motion to produce the statement allegedly signed by Brown. That request was denied by the court, the judge stating, "You know, I can't understand that this Court has any power to direct the state's attorney to give up any exhibits before they are offered. In any case, whether it is criminal or civil, this Court has no such power as I view it." *Id.* at 98.

If Fisher's statement, with Brown's signature on it, had been produced, the trial court and defense counsel would have seen that the statement consisted of two pages, one with Brown's printed signature, and another page with the name "Leon Brown" written out in entirely different handwriting. One of the witnesses to the taking of Brown's statement said that the printed version of Brown's signature was not the signature of Leon Brown. *Id.* at 240. See Handwritten Statements of Fisher and Brown (Jan. 19, 1929), *infra* app.A. This would have been fertile ground for cross-examination of Cusak and of the other State's witnesses at the hearing on admissibility of the confessions. At this hearing, Fisher testified that Brown couldn't read or write and that Cusak made the letters for Brown. *Abstract, supra* note 64, at 106. Brown testified that he told Cusak that he couldn't read or write, *Id.* at 123, but admitted at the suppression hearing that he could in fact write. Brown testified that he told Cusak he could not write because he did not want to sign a confession admitting a crime that he did not commit. *Id.* at 128. Officer Dawe, an investigator who was present when Brown signed Fisher's statement, stated that "Brown didn't say he couldn't write[;] he said he was a poor writer." *Id.* at 276. Dawe did not see Cusak write the letters out for Brown. *Id.* at 276.

The statements of the defendants were given to the defense after the judge ruled that they were admissible. At that time, Fisher's lawyer made a motion to re-open the hearing on the admissibility of the confessions, noting that Brown's "signatures" on the statements corroborated the testimony of the defendants. *Id.* at 147-48. That motion was denied. *Id.* at 148. There was no reference to the two "signatures" of Leon Brown in the Supreme Court of Illinois' opinion affirming the defendants' convictions. See *Fisher*, 172 N.E. 743.

Brown were being interviewed by Cusak. Dawe testified that Brown was brought in and was asked to attest to what Fisher had said. Dawe testified that "Brown printed his name and that Fisher wrote his."¹⁵⁷ Dawe denied that Fisher was abused during his interrogation.¹⁵⁸

Commissioner Stege testified that Shadlow confessed first.¹⁵⁹ Shadlow told Stege who was with him during the robbery.¹⁶⁰ Then the other defendants were brought in one by one.¹⁶¹ According to Stege, they each admitted their participation when interviewed separately. They were then brought together "and they all told their part in conversation."¹⁶² After talking to the four, Stege dispatched a squad to look for "big boy," presumably Steve Dixon.¹⁶³ Although Stege denied that Shadlow asked to speak to the State's Attorney, Stege did testify that after dusk, Judge Swanson (then the State's Attorney of Cook County) came to his office.¹⁶⁴ After that, statements were taken from each defendant. Stege denied that the defendants were beaten.¹⁶⁵ He also denied that Shadlow told him that he wanted an attorney.¹⁶⁶

Sgt. Barry, the officer who arrested the defendants at the house on Wabash, testified that he took Shadlow to see Commissioner Stege.¹⁶⁷ Barry testified that Shadlow told Stege that he was willing to tell the truth but that he wanted an attorney.¹⁶⁸ Barry also had contact with Jenkins. Jenkins took Barry to the location where Jenkins had discarded his gun, a .45 automatic.¹⁶⁹ Barry also talked to Fisher.

¹⁵⁷ *Abstract, supra* note 64, at 274.

¹⁵⁸ When Fisher was taken to the inquest on January 24, 1929, he was given the following admonition by the coroner: "It is my duty to notify you anything that you may say may be used for or against you, knowing that do you still wish to testify?" Fisher replied, "Not without the advice of counsel." *Id.* at 275, 389, 390.

¹⁵⁹ *Id.* at 278.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 77-78.

¹⁶² *Id.* at 78.

¹⁶³ *Id.* at 279.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 79.

¹⁶⁶ *Id.* at 80.

¹⁶⁷ *Id.* at 259.

¹⁶⁸ Barry's testimony was: "Shadlow was asked if he wanted an attorney. He said, 'I would like one,' and Commissioner Stege said, 'How would the State's Attorney do?' So he called the [S]tate's [A]ttorney and the [S]tate's [A]ttorney came over. Judge Swanson [the State's Attorney] came over, and while Commissioner Stege called the [S]tate's [A]ttorney I asked Shadlow how many boys or how many men were in this bank holdup that we locked up and he said, '[W]ell, you have got three. There is still one out.'" *Id.* at 259.

¹⁶⁹ *Id.* at 260.

Fisher told Barry that he gave three guns (the Savage automatic, the nickel plated Savage, and the Smith & Wesson used in the robbery) to Herbie Hare.¹⁷⁰ Hare was questioned about this fact.¹⁷¹ The guns were recovered from Hare's house.¹⁷² Barry also talked to Brown who admitted using two .38 caliber pistols.¹⁷³

The State also called civilian witnesses to establish the voluntariness of the confessions. The *Tribune* reported that the police and prosecutors brought in civilians to witness the confessions in order to "prevent repudiations of the confessions later."¹⁷⁴ Bank employee Alexander McKay witnessed the final confessions of Shadlow and Brown. He testified that Fisher refused to make a statement when brought before the civilian witnesses. McKay testified that Shadlow, Brown, and Fisher appeared to be in good physical condition when he saw them.¹⁷⁵ McKay testified that he did not know what happened to these defendants before they made their final statements.¹⁷⁶

Robert McEwen, a dentist who worked above the bank, testified that he was present when Shadlow made his statement. McEwen stated that Shadlow was brought into the room where Stege and Belows were present.¹⁷⁷ At first Shadlow said that he was the driver of

¹⁷⁰ *Id.* at 264.

¹⁷¹ Interestingly, there was very little mention of Hare's role in the robbery at trial, even though there was evidence to suggest that he planned the robbery, providing the weapons used in the robbery and the house where the robbery was planned. The defendants were arrested in Hare's rooming house. *Id.* at 261.

¹⁷² *Id.* at 262.

¹⁷³ *Id.* at 264.

¹⁷⁴ *Second Murder Charge Made Against Bank Robbery Chief*, *supra* note 71. ("Dr. John Roy French, Dr. Robert McEwen, and John Geraghty, a coal dealer, witnessed the signing of the confessions of Shadlow and the others. Deputy Stege explained that he took this precaution to present repudiation of the confession later. Numerous photographs also were taken of the prisoners by official police photographers, thus establishing a precedent in the handling of criminal cases.")

¹⁷⁵ *Abstract*, *supra* note 64, at 184.

¹⁷⁶ The use of civilian witnesses to support the voluntariness of the confessions was an obvious tactic employed by the police and prosecutors. It is noteworthy, however, that these witnesses did not see the defendants until they were ready to confess. McKay even testified: "I don't know what happened to Brown or to any of the defendants before they were brought into Commissioner Stege's office that Saturday evening, January 19, when I saw them sign certain statements." *Abstract*, *supra* note 64, at 184. The civilian witnesses played essentially the same role a video tape of the confessions might play, corroborating the reliability of the confession's content. Of course, the Chicago police limited the use of the independent witness in the same way they now limit video-tape use; they were barred from the interrogations until the defendant agreed to confess. *Id.* at 199.

¹⁷⁷ Also present were Mr. Solomon, Mr. McKay, Doctor French, and Officer Sullivan (the court reporter). *Id.* at 223.

the car and signed a statement to that effect.¹⁷⁸ Shadlow stated, before he signed his first statement, that he had not been abused in any way. Brown was then brought in.¹⁷⁹ Brown admitted that he had two guns and that he fired shots in the bank after Martin French, the security guard, opened fire. According to McEwen, Brown stated that he had not been mistreated.¹⁸⁰ Fisher was then brought in and stated that he did not feel well.¹⁸¹ Fisher also signed a statement.¹⁸² Jenkins was then called in and admitted driving the car.¹⁸³ Jenkins signed a statement. McEwen testified that Jenkins said that he was not abused in any way.¹⁸⁴

John French, another dentist who worked above the bank, and the nephew of the victim, Martin French, was also called to testify at the hearing on the defendants' motion to suppress statements. French testified that he heard a commotion and went into the bank. He saw his uncle on the ground. He put his uncle on a stretcher and instructed the ambulance driver to take his uncle to Mercy Hospital. Later, at the police station, he had a conversation with Shadlow in which Shadlow admitted being in the crowd when Martin French was placed on the stretcher.¹⁸⁵ French testified that he was present when Shadlow and Brown made their statements in the presence of Stege and Bellows. He testified that Shadlow and Brown were not mistreated in his presence.¹⁸⁶ He also testified that he saw Brown sign his statement.¹⁸⁷ Fisher was then brought in. Fisher admitted that he had made a voluntary statement but refused to sign another state-

¹⁷⁸ *Id.* at 224.

¹⁷⁹ *Id.* at 227.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 229.

¹⁸² McEwen spoke to Fisher during the reenactment of the crime at the bank. He told Fisher that he was standing at his window, overlooking the sidewalk. McEwen told Fisher that he could have shot them if he had a gun. According to McEwen's trial testimony, Fisher told McEwen that he would have shot McEwen if he had seen him at the window. *Id.* at 235, 229.

¹⁸³ *Id.* at 230.

¹⁸⁴ McEwen testified that he had a conversation with Jenkins at the re-enactment of the crime during which he (McEwen) asked Jenkins how he got involved in the robbery. According to McEwen, Jenkins replied, "I don't know, doctor, it is just foolish, following someone else." *Id.* at 230, 232.

¹⁸⁵ *Id.* at 248.

¹⁸⁶ *Id.* at 250.

¹⁸⁷ *Id.*

ment.¹⁸⁸ According to French, Fisher stated, "I have already made a statement. My head aches."¹⁸⁹

2. *Ruling on Admissibility of the Confession*

The trial court judge denied the motion to suppress the statements, ruling that the testimony of the police officers and civilian witnesses established that the confessions were voluntary.

The Supreme Court of Illinois gave short shrift to the defendants' contention that their confessions were coerced, relying completely on the trial court's ruling that the confession were voluntary.

The finding of the court that the confessions were voluntarily made is assumed as error. We are of the opinion, under the circumstances here detailed and the testimony appearing before the court at that time, that it was justified in the conclusion that the confessions were voluntary.¹⁹⁰

Illinois courts were not alone in their refusal to acknowledge that the "third degree" was often employed by police and prosecutors to obtain confessions.¹⁹¹ Where the question of whether coercion occurred depended upon the resolution of credibility both between police and prosecutors on the one hand and the defendant on the other, the police and prosecutors always won.¹⁹² Only recently have Illinois courts taken a closer look at this issue. Illinois courts now permit the defendant to establish a habit or routine practice or *modus operandi* of police abuse of suspects, following a path-breaking decision by Justice Warren Wolfson.¹⁹³

The Illinois Supreme Court did not address the question of whether Shadlow had asked for an attorney. Defendants were not entitled, under the law at that time, to have counsel present during an

¹⁸⁸ *Id.* 252.

¹⁸⁹ *Id.* 254.

¹⁹⁰ *Fisher*, 172 N.E. at 751.

¹⁹¹ "[T]he local courts almost always resolved the almost inevitable 'swearing contest' over what happened behind closed doors in favor of the police perhaps for the reasons suggested by Walter Schaeffer, *Federalism and State Criminal Procedure*: 'In the field of criminal procedure [a] strong local interest competes only against an ideal. Local interest is concerned with the particular case and with the guilt or innocence of the particular individual . . . while it is hard indeed for any judge to set apart the question of the guilt or innocence of a particular defendant and focus solely upon the procedural aspects of the case, it becomes easier [in] a reviewing court when the impact of the evidence is diluted.'" YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 444 (10th ed. 2002)(citation omitted).

¹⁹² "Almost no garden variety criminal defendant who cried 'coerced confession' but lost the 'swearing contest' below was likely to survive the winnowing process above." *Id.* at 445.

¹⁹³ *People v. Cannon*, 688 N.E.2d 693 (Ill. App. Ct. 1997).

interrogation.¹⁹⁴ Moreover, criticism of police practices that involved "trickery and deceit" was uncommon. Recall that Shadlow asked for an attorney. He was asked if the "State's Attorney" would do. Police Commissioner Stege must have known that the State's Attorney would not have acted on behalf of Shadlow and intended to lull Shadlow into a false sense of security. Indeed, after Shadlow consulted with Assistant State's Attorney Bellows, the *Tribune* reported that Police Commissioner Stege announced that he would try to save Shadlow's life after consulting with State's Attorney Swanson.¹⁹⁵

The "trickery" apparently employed by Commissioner Stege and the State's Attorney's office to induce Shadlow to confess was precisely the kind condemned in *Miranda* and was part of the basis for the *Miranda* Court's promulgation of prophylactic rules:

When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the suspect off balance, for example, by trading on his insecurity about himself or his surrounding. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.¹⁹⁶

D. PRE-TRIAL PUBLICITY

As noted above, the apprehension of the suspects in the Franklin Trust robbery was the subject of much newspaper publicity. The defendants were paraded before newspaper reporters, their interrogations were witnessed by ordinary citizens, and the re-enactment of the crime was front page news.

The papers were full of reports about the incident and the ensuing investigation. Reporters were present when the statements were made; the fact that the defendants confessed, as well as what they said, was reported in detail in the papers.

The State made a calculated decision to seek publicity. The prosecutor's strategy in this regard was very clear. Immediately after the defendants' confession, newspaper photographers took pictures of the defendants holding the pencils used to sign the confession. The

¹⁹⁴ See *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁹⁵ *Second Murder Charge Made Against Bank Robbery Chief*, *supra* note 71, at 1.

¹⁹⁶ *Miranda v. Arizona*, 384 U.S. 436, 455 (1966).

photograph was staged by the prosecutor. The papers covered and photographed the defendants' re-enactment of the crime.¹⁹⁷ The conduct of the prosecutor in seeking the publicity generated by the case would violate modern legal standards regarding pre-trial publicity.¹⁹⁸

The defendants made a motion for a change of venue over the objection of their lawyer. The motion cited the alleged prejudice of judges to whom the case might be assigned rather than the impossibility of obtaining a fair trial from a Chicago jury.¹⁹⁹ The defense lawyers did not make a motion for change of venue based upon juror prejudice as the result of the extensive pre-trial publicity even though the trial took place only four months after the bank robbery.²⁰⁰ There is no explanation for this strategic choice, other than the fact that at the time of this trial, the law regarding the effects of pre-trial publicity on juror decision-making was not well-developed.²⁰¹ It is also possible that the defense lawyers decided that three African American defendants were more likely to receive a fair trial in Chicago than in less racially diverse counties outside of Cook County.²⁰²

¹⁹⁷ MOLEY, *supra* note 1. In a chapter of his book entitled "Trial By City Desk," Moley expressed concern that "[w]hen the attitude created by the newspaper accounts is hostile to the defendant, the tendency is to destroy the practical value of the presumption of innocence" *Id.* at 193.

¹⁹⁸ See ABA Model Rule of Professional Conduct 3.6(a) ("A lawyer who is participating or who has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows, or reasonably should know, that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding on the matter.")

¹⁹⁹ See Motion for a Change of Venue (Apr. 6, 1929) (on file with author). The motion alleged that: "your petitioner has insisted upon his attorney preparing and filing a petition for a change of venue, but that the said attorney has refused to prepare and file the petition for a change of venue, and only consented to prepare the petition for a change of venue and the Affidavits in support thereof . . . after your petitioner threatened to inform the court that his said attorney had refused to prepare the said petition" *Id.*

²⁰⁰ Notice of Motion for Change of Venue, *People v. Fisher* (on file with author).

²⁰¹ See *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Patten v. Yount*, 467 U.S. 1025 (1984); *Mu'min v. Virginia*, 500 U.S. 415 (1991).

²⁰² It appears that the jury was sequestered during the 8-day trial. However, after the verdict was announced, it was discovered that during jury deliberations, members of the jury, without the knowledge of the judge or the lawyers involved in the case, left the jury quarters at the new courthouse at 26th and California to obtain food, clean clothes, and a radio. A post-trial petition filed by the defendants alleged that the jury heard highly prejudicial reports over the radio concerning the criminal backgrounds of the defendants. Affidavit of Richard E. Westbrooks (on file with author). This affidavit has no date, but was sworn out sometime after April 26, 1929.

E. SEVERANCE

Fisher asked for a separate trial, alleging that it was improper to try him with the other defendants who had made confessions implicating him.²⁰³ Fisher also filed a pre-trial motion arguing that he should be given a separate trial because his defense was antagonistic to that of the other defendants.²⁰⁴ In this motion, Fisher asked for the production of the statements of the other co-defendants. The motion also alleged that he had been beaten and tortured by police officers.²⁰⁵ He alleged that he made the statement in order to avoid further torture.²⁰⁶ He further alleged in this motion that the reenactment of the crime was coerced.²⁰⁷

The court denied the motion for a separate trial and motion for production of the statements, stating, "I do not think that I have a right to require the state to produce the confessions."²⁰⁸ There is nothing in the record to indicate that the judge saw the defendants' statements before he ruled on the motion for severance. Thus, when he denied Fisher's motion, he did so without knowing whether the defendants' statements were, in fact, antagonistic.

The Supreme Court of Illinois rejected Fisher's claim that he was denied a fair trial as the result of the trial court's adverse ruling on his motion for severance, holding that the confessions were not "antagonistic" and that the "confessions were . . . in substance identical to the others"²⁰⁹ The Supreme Court of Illinois also relied upon its

²⁰³ The motion alleged that:

the state's attorney has expressed his intention to introduce said statements [the statements of the co-defendants] in evidence at trial; that said statements, admissions, and confessions were made outside the presence of Lafon Fisher, and are incompetent evidence as to the defendant Lafon Fisher, and will be prejudicial to the defendant, Lafon Fisher, and will deprive him of a fair and impartial trial . . . and the state relies wholly upon the prejudicial effect of cumulative evidence, incompetent as against the defendant Lafon Fisher.

Abstract, supra note 64, at 8.

²⁰⁴ *Id.* at 16.

²⁰⁵ *Id.* at 14.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 11.

²⁰⁹ *Fisher*, 172 N.E. at 749.

conclusion that there was no prejudice because the defendants' statements were consistent with each other.²¹⁰

This finding of consistency was basically correct in so far as the statements of Shadlow, Fisher and Brown were concerned. The Illinois Supreme Court's ruling was manifestly incorrect as it applied to Jenkins' statement. Throughout the trial the defendants' lawyers, except for Jenkins' lawyer, were careful to make objections for the record asking the judge to instruct the jury that statements of the other defendants not be considered by the jury as evidence against their clients. As the Supreme Court held in *Bruton*, and in cases following *Bruton*, it is virtually impossible for a jury to live by such admonitions.²¹¹ This was especially true in this case, in which the four defendants each made statements that were summarized by numerous police and lay witnesses and which were introduced into evidence without any redactions.

Although the Supreme Court of Illinois held that the defendants did not present antagonistic defenses, Jenkins' defense (if, indeed it could have been characterized as a "defense") was clearly at odds with that of Brown, who testified that he had nothing to do with the robbery. The defendants' attorneys presumed that they had no right to cross-examine Jenkins because he was a co-defendant.²¹²

Jenkins, the only defendant who went to trial in the Fisher, Brown, Shadlow and Jenkins trial who did not receive the death penalty, testified that he was present at the robbery but did not participate in the shooting. He testified that he ran away from the bank after he

²¹⁰ The history of confrontation clause jurisprudence is long, complicated, and beyond the scope of this article. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant is prejudiced when a co-defendant's statement is introduced against him, even when a limiting instruction is given. Redaction of a co-defendants' statements is effective only when the out of court statement contains no identifiable reference to the non-testifying defendants. See *Richardson v. Marsh*, 481 U.S. 200 (1987); *Gray v. Maryland*, 523 U.S. 185 (1998). A non-testifying co-defendant's statement that is not otherwise admissible in evidence is not made admissible because it is consistent with the defendant's statement. *Cruz v. New York*, 481 U.S. 186 (1987).

²¹¹ See *Bruton*, 391 U.S. at 137; See also *Cruz*, 481 U.S. 186, holding that *Parker v. Randolph*, 442 U.S.62 (1979) (the admission of defendants' "interlocking" confessions do not violate the *Bruton* rule) was wrongly decided in light of *Bruton*. Thus, under *Cruz*, the Fisher defendants would have been entitled to separate trials. The Supreme Court has reaffirmed its adherence to *Bruton*, holding that redaction of a defendant's name from a co-defendant's statement must be done with great care to ensure that the co-defendant's statement is not accusatory as to the defendant. See *Gray*, 523 U.S. at 193-93.

²¹² Mr. Lofton, attorney for Lafon Fisher, stated: "I understand under the law we have a right to cross-examine on what the state introduces but not to cross-examine another defendant." *Abstract*, *supra* note 64, at 384.

heard the first shot fired. He had a gun in his pocket, which he threw away in an alley.²¹³ Jenkins admitted driving to the bank with two other people.²¹⁴ Jenkins testified that there were two shotguns in the car.²¹⁵ He also testified that he went to the bank with a gun and that he knew he was going to participate in the hold-up of a bank.²¹⁶ He was not permitted to name the other participants in the robbery.²¹⁷

On cross-examination of Jenkins, the State accomplished by clear implication that which it could not prove. Instead of asking Jenkins who was with him during the robbery, Prosecutor Brooks established that Jenkins' statement to the police was reliable. Jenkins also testified on cross-examination that the statement that he gave to the police was read to him before he signed it.²¹⁸ When asked whether the statement (which implicated the other co-defendants) was true, Jenkins' attorney interrupted and stated, "And he didn't deny it. He keeps saying, 'wasn't that true?' and he never said that it wasn't true."²¹⁹ On appeal, the defendants argued that the trial court, on its own motion, should have ordered a separate trial for Jenkins because Jenkins implicated the others. The Supreme Court of Illinois rejected this contention.²²⁰

Later, Jenkins himself claimed that he had been prejudiced by the joint trial. In a petition for executive clemency he claimed that "during trial all of the extenuating circumstances [of his participation in the robbery] which might have been favorable to [him] were submerged under the weight of prejudicial evidence presented against the other members of the group which were on trial."²²¹

It was not until 1968, in *Bruton*, thirty-eight years after the Fisher trial, that the Supreme Court identified the prejudice that could result from the admission of a co-defendant's statement against a non-testifying defendant, and only recently in *Gray v. Maryland*²²² was the *Bruton* doctrine was further refined.

²¹³ *Id.* at 382.

²¹⁴ *Id.* at 387.

²¹⁵ *Id.* at 384.

²¹⁶ *Id.* at 383.

²¹⁷ *Id.* at 385.

²¹⁸ *Id.* at 387.

²¹⁹ *Abstract*, *supra* note 65, at 387.

²²⁰ Answer to Petition for Rehearing, Sup. Ct. of Ill., Apr. 18, 1930, 14-15 (on file with author).

²²¹ Application for Executive Clemency Filed by Melvin Jenkins (Dec. 3, 1946) (on file with author).

²²² *Gray v. Maryland*, 523 U.S. 185 (1998).

F. JENKINS' "GUILTY PLEA"

The lawyers for the other co-defendants argued that Jenkins, who did not contest the evidence at trial, and who, in effect, testified against the other defendants, presented a defense antagonistic to that of his co-defendants. Moreover, Jenkins' lawyer did not cross-examine any of the state's witnesses, sending a message to the jury that he did not dispute the evidence presented against the defendants.

Jenkins' lawyer made his theory of the case clear in his closing argument: Jenkins never entered the bank and ran away before the shots fatal to French were fired. Jenkins had no prior record. Jenkins' lawyer argued, in closing, "he doesn't deserve death, and I am not asking you to turn him loose. How is that? I am not asking you to do it, although under the law, you can if you want to."²²³ Jenkins' lawyer went on to beg for mercy for his client, promising that Jenkins would testify against Hare at Hare's later trial:

If you are merciful in this case, I assure you that the State will vouch for his veracity when Herbie's trial gets to going. I assure you that they won't ask you to believe he was there, when French was killed because he wasn't, he wasn't.²²⁴

After Jenkins' lawyer completed his closing argument, the lawyers for Shadlow, Brown, and Fisher asked for a mistrial, arguing that Jenkins' lawyer had argued that their clients were guilty. Jenkins' co-defendants also argued that by stating that Jenkins was able to take the stand because he had no criminal record to hide, Jenkins' lawyer implied that the other defendants had criminal records. The trial judge denied these motions for mistrial.²²⁵

In post-trial motions, and in their brief filed in the Supreme Court of Illinois, Shadlow, Brown, and Fisher argued that the State made a secret deal with Jenkins. The defendants alleged that in return for Jenkins' testimony, the State agreed not to argue vigorously that Jenkins should be put to death. The State denied making such a deal, pointing out the fact that it asked in closing argument that Jenkins be sentenced to death.²²⁶ Although Prosecutor Brooks did ask that Jenkins receive the same penalty as the other defendants, he reserved

²²³ *Abstract, supra* note 64, at 450.

²²⁴ *Id.* at 454.

²²⁵ *Id.* at 458.

²²⁶ Prosecutor Brooks, in opposing the defendants' motion for mistrial after Jenkins' closing argument, stated "Let the record . . . reflect show that the state now states to the court that we have no agreement with the defendant Jenkins and that we will ask for the death penalty on behalf of Jenkins, the same as the other defendants." *Id.* at 459. In fact, Brooks

kins receive the same penalty as the other defendants, he reserved the bulk of his closing argument for strident condemnation of Shadlow, Brown, and Fisher. Brooks paid little attention to Jenkins in his closing argument.²²⁷

That Jenkins made a deal with the prosecutors is supported by her testimony at this 1953 parole hearing. There, Jenkins testified that he plead guilty to the charges for which his co-defendants received the death penalty. At that parole hearing, the following exchange took place between the Parole Board and Jenkins:

Q. Did you plead guilty, Melvin?

A. Yes, Sir.

Q. All the rest of your fellows, were they tried, or did they plead guilty?

A. Four of them were tried together, see, it was, I pleaded guilty and 3 asked for trials. They tried the one [Hare], then they caught one and tried him [Dixon] last. The one they caught last was about a year later.²²⁸

Thus, twenty-three years after his co-defendants were executed, Jenkins corroborated his co-defendants' assertion that he made a deal with the State in order to avoid the death penalty and possibly, to ensure that he would eventually be released from prison. Though he in fact did not plead guilty in any formal way (Jenkins was found guilty by the jury), Jenkins' 1953 testimony before the Parole Board suggests that he thought he pleaded guilty.

Assuming that the lawyers for Fisher, Shadlow, and Brown were intentionally deceived by the State about whether Jenkins had made a deal to avoid the death penalty, were his co-defendants prejudiced? The answer is surely yes. When Jenkins testified, the lawyers for his

did argue that Jenkins deserved the death penalty: "It was too hot for Jenkins then and it is too hot now. But he is just as guilty as the rest of them except he is a coward. Jenkins ran away. Where do we find Jenkins next? We find him with Herbie Hare. We find him at Dixon's home." *Id.* at 475.

²²⁷ See *Abstract*, *supra* note 65, at 460-82 (quoting the closing argument of Wayland Brooks).

²²⁸ Parole and Pardon Board Hearing, Oct. 27, 1953, at 4 (on file with the author). Jenkins was paroled from prison in 1954. When paroled, he was fifty years old and had spent over twenty-five years in prison. The parole board member who recommended parole stated that Jenkins' institutional record had been perfect since 1946. He had participated in a malaria program and a salmonella program. Parole and Pardon Board Hearing, Oct. 29, 1954, at 7 (on file with the author). Jenkins successfully completed parole in 1959. Letter to Thomas O'Brien, Superintendent, Paroles and Pardon Board from T. Edward Austin Superintendent, Supervision of Parolees, Oct. 23, 1959 (on file with the author). In his Application for Clemency or Commutation of Sentence, Jenkins stated that Shadlow fired the shotgun blast that killed French. Application of Melvin Jenkins For Clemency or Commutation of Sentence (on file with author).

co-defendants were unable to show that Jenkins' testimony was procured by an agreement with the State. Evidence of an agreement between Jenkins and the state would have undermined the credibility of Jenkins' testimony.

If the prosecutors misled the defendants and the court about the existence of a deal with Jenkins, it may have been because in 1929 its duty to produce such evidence had not been established. *Brady v. Maryland*²²⁹ first established the State's duty to disclose further evidence. The duty to disclose impeachment evidence consisting of deals, promises, or inducements under the *Brady* doctrine was clearly established only in 1985.²³⁰

G. PRE-TRIAL DISCOVERY

The most notable instance of limited discovery was the fact that the State was not required to produce the statements of the defendants before trial. Indeed, the defendants were not even permitted to see their written statements until after they were offered and received into evidence.²³¹ The defendants repeatedly asked that their statements be produced prior to their introduction at trial and raised the fact that the statements were not produced as a point for reversal on appeal. In rejecting this argument, the Supreme Court of Illinois stated:

Nor was it the right of plaintiffs in error on that hearing [the hearing on the admissibility of the confessions] to have the confessions or a stenographic report of them, produced, as the only question involved was whether the confessions were voluntary. Refusing to produce them was not suppression of evidence on the part of the State's attorney. They were later offered on the trial, and the court instructed the jury, as to each of them, that it was admitted only as to the defendant making it; that anything therein stated relating to any other of the defendants than the one signing the confession could not be considered as evidence against such other defendant. An instruction to that same purport was given to the jury on the giving of instructions. In a case such as the instant case, where all of the defendants made voluntary confessions which were in substance the same, and which confessions, though implicating the others, were

²²⁹ 373 U.S. 83, 87 (1963).

²³⁰ *Id.*

²³¹ Illinois' criminal code first included a requirement that statements of defendants be turned over to the defense in 1964. See ILL. REV. STAT. CH. 38 § 114-10 (1964). Similar provisions exist in all states and also govern federal prosecutions. "Historically, the written or recorded statement of the defendants was one of the first items included in the defendants right to discovery." KAMISAR, ET AL., *supra* note 190, at 1190.

likewise confessions of their own acts, it was not error to admit them as a whole in evidence.²³²

The defendants, in their Petition for Re-Hearing before the Supreme Court of Illinois, eloquently rebutted the assertion that the defendants were not prejudiced by their inability to gain access to their confessions before trial:

May we not observe that a confession reduced to writing is the best evidence of its contents and it being the duty of the Court out of the presence of the jury to determine its admissibility, the instrument itself must be submitted to the Court and counsel in order that any erasures, interlineations, explanations, peculiarities, appearing on the face thereof might be inquired about and all witnesses may be examined and cross examined concerning same. . . . May we ask how the Court can determine the admissibility of a written instrument without having the instrument before it; how the attorneys for the defendant can cross examine the witnesses for the state concerning the execution of the particular instrument with out having the instrument before them.²³³

The defendants also noted in their petition to note the particular prejudice to Brown that resulted from his statement being unavailable to the judge and to the defense prior to trial, and even prior to and during the hearing on the admissibility of his confession:

An inspection of the Peoples Exhibit 4²³⁴ will disclose the signature of Leon Brown, also People's Exhibit 6²³⁵ will show the signature of L. Brown which was testified to on the preliminary hearing as being the signature of the plaintiff in error Leon Brown. Neither the court nor counsel for the plaintiff in error were in a situation to cross examine any witnesses concerning the difference in the signatures nor the difference in the contents of the confessions, as the state's attorney refused to produced the same, and the court held that he was not aware that he had any power to compel their production. The court has overlooked the fact that the confessions were not produced until after the issue of their competency had been fully passed upon by the court; that the printed signature as it appears on People's Exhibit 6 corroborated the testimony of Leon Brown before the court that he had disguised his handwriting, and denied to the officers his ability to write, in order that he might thereby demonstrate when the confession was later produced that he did not voluntarily sign it.²³⁶ The document itself, People's Exhibit 6, impeached the testi-

²³² *Fisher*, 172 N.E. at 751.

²³³ Defendants' Petition for Rehearing 23 (Mar. 18, 1930) (on file with author).

²³⁴ *Photostated in Abstract*, *supra* note 64, at 316.

²³⁵ *Id.* at 322.

²³⁶ *Id.* at 123.

mony of Officer Cusak before the court, who testified that the signature was not printed on the confession; that he had no conversation with Brown in reference to his ability to read and write.²³⁷ Where the issue before the court on the question of what transpired in that squad room became a question of veracity between the defendant and the police officers, who were the only ones present at the taking of these preliminary statements of Fisher and Brown, can this court say that the confession on its face was not material?²³⁸

The operative rationale for not turning over defendants' statements, although not relied upon by the Illinois Supreme Court, was stated in the prosecution's answer to the defendants' petition for rehearing:

Plaintiffs in error cite no cases or authority and we can think of none that holds that the state must furnish them a copy of a confession which they say they made. One would presume that they were sufficiently informed of what they said without further information, especially when they are insisting that the confession made by them were obtained by duress and promises of clemency.²³⁹

The unfairness of the position taken by the state is apparent on its face and has been unanimously repudiated by courts and legislatures. Implicit in the rationale advanced by the State was the assumption that the defendants' statements would be recorded accurately. However, when recorded statements are made available, as they are today, allegations that such statements are recorded inaccurately or are otherwise unreliable are routinely made. Videotaping of interrogations is a means of resolving the reliability issue. Recently, the State's Attorney of Cook County has instituted procedures requiring that statements in murder cases be videotaped. However, this measure does not require that the entire interrogation be videotaped, a measure that would provide even more data upon which to base determination of voluntariness and reliability.²⁴⁰

²³⁷ *Id.* at 96, 97.

²³⁸ Defendants' Petition for Rehearing 25 (Mar. 18, 1930) (on file with author).

²³⁹ Answer to Petition for Rehearing 32 (Apr. 18, 1930), (on file with author).

²⁴⁰ See Steven A. Drizin & Beth A. Colgan, *Let the Cameras Role: Mandatory Video-Taping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 Loy. U. Chi. L.J. 337 (2001); Wayne T. Westling & Vicki Waye, *Video Taping Police Interrogation: Lessons from Australia*, 25 Am. J. Crim. L. 493 (1998); Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. Marshall L. Rev. 537 (2001).

H. THE RELIABILITY OF THE EYEWITNESS IDENTIFICATIONS

1. *The Presence of Witnesses at the Taking of the Defendants' Confessions*

The reliability of the identifications made in this case is called into question by the presence of key eyewitnesses during the taking of the defendants' confessions and the presence of key eyewitnesses during the re-enactment of the crime. While there is little doubt that at least some, or perhaps even most, of the defendants charged were present during the robbery, the eyewitness identifications of the defendants and their accounts of the roles that the defendants played in the robbery must have been influenced by the fact that the key witnesses were present when the confessions were made and during the re-enactment. During the re-enactment of the crime, witnesses were also allowed to speak to the defendants, eliciting key admissions from them.

The presence of the eyewitnesses at the taking of the confessions and during the re-enactment undoubtedly influenced the witness' identification testimony at trial. Dr. McEwen attended the inquest. He did not pick anybody out at the inquest or at the Stanton Avenue Police Station where he observed the defendants sign their statements.²⁴¹ He did not see anybody pick out Brown at the Stanton Avenue Police Station. At the re-enactment, McEwen saw Brown standing with the others in handcuffs before the police asked the defendants to take their positions. He also spoke to Brown without obtaining permission from the police officers.²⁴² Geraghty identified Shadlow at the Stanton Avenue police station.²⁴³ He did not identify Brown.²⁴⁴

²⁴¹ *Abstract, supra* note 64, at 244.

²⁴² *Id.* at 245.

²⁴³ *Id.* at 258.

²⁴⁴ No clear record was made as to how the identification of Shadlow was made, whether Shadlow was identified out of a group or whether he was shown to witnesses alone. Sgt. Barry testified that 21 men had been taken from Hare's house on Wabash. It is not clear if Geraghty identified Shadlow from among that group or if Shadlow was brought before Geraghty individually. Barry testified: "I had 21 suspects and I might have shown the whole twenty one to Mr. Geraghty. Maybe I did. He had an opportunity to see all of them. I don't know if Mr. Jahn came that morning, too. He had an opportunity to see all of them if he came over there, I don't know. I don't think that Miss Wissig [an employee of the bank who testified at trial] did see these men before the inquest . . . I don't know, but I believe I did show all twenty-one to any one from the bank who came to the station." *Id.* at 270. Geraghty was also asked to identify all of the defendants before the inquest. He could only identify Shadlow. *Id.* at 268, 270.

Brown testified at trial that he was taken to the hospital to be identified by the two witnesses who were wounded in the robbery.²⁴⁵ Even when Brown told those witnesses that he was involved in the robbery (pursuant to Stege's instructions), those witnesses failed to identify him.²⁴⁶ Brown testified that McKay, one of the witnesses to the robbery, was coached by Sgt. Booth to identify him at the inquest.²⁴⁷

2. *The Re-enactment*

Sgt. Barry testified that after the defendants confessed, Commissioner Stege asked them "if they would be willing to go out the next day and show him how the crime was committed, and they said they would."²⁴⁸ On the day after the robbery, Jenkins, Shadlow, Brown, and Fisher were taken to the bank, along with a police photographer.²⁴⁹ According to one report, the defendants showed signs of having been abused.²⁵⁰ The defendants were asked to take the guns that they used and to stand where they stood during the robbery.²⁵¹ Barry held the guns. Brown took two .38 revolvers. Fisher took the .32 automatic. Jenkins took a .45 automatic. Shadlow took the .32 caliber pistol.²⁵² Barry was asked who took the shotgun. Barry replied, "I gave that to Sgt. Booth, and Sgt. Booth went over in a corner, where Brown said that a man by the name of Dixon was standing."²⁵³ Also present during the re-enactment were Commissioner Stege, Mr. Solomon, Mr. Straus, Sgt. Booth, Officer Olson, Mr. McKay, and Ms. Wissig.²⁵⁴

²⁴⁵ *Id.* at 413.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 416.

²⁴⁸ *Id.* at 265.

²⁴⁹ *Id.*

²⁵⁰ Bauman explains,

The four not only confessed, under police beating, but agreed to re-enact the deadly event. Bruised, black-eyed, manacled, and under heavy guard, they were taken back to the bank, where unloaded revolvers were placed in their hands. Various employers assumed the duties they were occupied with at the moment the robbers burst in.

BAUMAN, *supra* note 3, at 286.

²⁵¹ *Abstract, supra* note 64, at 265.

²⁵² *Id.* at 266.

²⁵³ *Abstract, supra* note 64, at 266.

²⁵⁴ *Id.* at 267.

Brown testified at trial that he did not want to participate in the re-enactment. He participated only after Stege came into the room and slapped him a couple of times.²⁵⁵ According to Brown, Stege told him where to stand at the bank²⁵⁶ and which pistols to claim.²⁵⁷ Brown testified that there were fifty people in the bank during the re-enactment and a crowd of two hundred to three hundred looking in.²⁵⁸ Brown denied telling Shadlow where to stand. However, Brown admitted having a conversation with McEwen. Brown denied admitting to McEwen that he was present in the bank during the robbery.²⁵⁹

William C. Jahn, a teller at the bank, made identifications at trial not made earlier, after seeing the re-enactment. Before the trial, at the coroner's hearing, Jahn testified that he did not get a good look at the men who entered the bank.²⁶⁰ He testified at the Coroner's inquest that he was looking at the gun that was pointed at him, not the facial features of the robber.²⁶¹ Despite his earlier testimony at the inquest, Jahn identified Fisher and Brown at trial as two men he saw with guns in the bank.²⁶² He also testified as to the re-enactment. He testified that during the reenactment,

Brown stood at the front of the cages with two guns, revolvers, and Fisher vaulted over the top of the cage the way he had on the 18th. I saw Shadlow in the bank on January 20th. He was standing towards the south side of the bank with a revolver in his hand near Mr. Olson's desk, half-way between that and Mr. McKay. I saw Melvin Jenkins there at that time. He was standing in the doorway with an army automatic pistol in his hand."²⁶³ Jahn also testified to a conversation he had with Fisher at the re-enactment. According to Jahn, Fisher admitted being in the bank with a gun and said, "Oh, I wouldn't have shot you, I could have got you some other way."²⁶⁴ Jahn testified that he went to the police station on the day after the robbery, that he was shown a number of persons who were in custody, and that he did not identify anyone.²⁶⁵

²⁵⁵ *Id.* at 409.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 412.

²⁵⁸ *Id.* at 410.

²⁵⁹ *Id.* at 413.

²⁶⁰ *Id.* at 157.

²⁶¹ At the coroner's inquest, Mr. Jahn was asked, "At any time did you notice his [the defendant who vaulted over the teller's cage to scoop up the money] face?" Jahn replied, "I did not sir." *Id.* at 158, 390.

²⁶² *Id.* at 155.

²⁶³ *Id.* at 155-56.

²⁶⁴ *Id.* at 156.

²⁶⁵ *Id.* at 157.

The identification procedures employed by the police were unquestionably suggestive, arguably so unnecessarily suggestive as to be “conducive to irreparable mistaken identification,” thus constituting a due process violation under modern-day constitutional criminal procedure.²⁶⁶

I. PROMPT PRESENTMENT TO A JUDICIAL OFFICER

The defendants were arrested on January 18, 1929. They were not “booked” until after the inquest on January 24, 1929.²⁶⁷ According to Sgt. Barry, “[t]he lockup people had charge of the prisoners, and won’t permit any one to see them until they are booked.”²⁶⁸ Commissioner Stege testified that the defendants were brought to his office at about 2:00 or 3:00 p.m. on January 19, 1929 and were there continuously until January 29th when they finally went to court.²⁶⁹ During this time, the defendants were interrogated, made statements, re-enacted the crime, and attended an inquest. No reason is apparent from the record suggesting why the defendants were not taken to court sooner. The length of time between arrest and presentment to the judge was excessive by any standard. However, the Supreme Court did not require a prompt determination of probable cause until 1975 when it decided *Gerstein v. Pugh*.²⁷⁰ Only in 1991 did the Supreme Court define “prompt” as 48 hours.²⁷¹

J. AGGRAVATION/MITIGATION

Under Illinois law at the time of the defendant’s trials, the jury in the murder case had the option of sentencing the defendant to death, to life in prison, or to a fixed term of years in prison.²⁷² The jury was given no guidance in making this awesome decision other than the arguments of counsel. No instruction laid out factors in “aggravation and mitigation.” Indeed, those terms were not even referenced during the trial. The defense lawyers for the defendants argued only guilt/innocence during their closing arguments, while the prosecution argued that the defendants were guilty and that they should be put to death. Also adding to the uncertainty regarding the standards that the

²⁶⁶ See *Stovall v. Denno*, 388 U.S. 293 (1967); *Simmons v. U.S.*, 390 U.S. 377 (1968).

²⁶⁷ *Id.* at 267.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 280.

²⁷⁰ 420 U.S. at 103 (1975).

²⁷¹ *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

²⁷² Jury Verdict Form (on file with author).

jury should apply at sentencing, the judge orally instructed the venire prior to trial as follows:

In any case where you find a man guilty, this court always has the right and opportunity of setting that verdict aside, or if the punishment is excessive and the facts in the case do not warrant that the punishment fixed by the statute should be carried out to a defendant found guilty by you. This court has the right to put the defendant on probation.

The judge further instructed the venire that "[e]very defendant found guilty and sent to the penitentiary for one year, or ten years, or life, or whatever number of years, may be paroled after eleven months."²⁷³

The defendants objected to this instruction, arguing that it allowed the jury to believe that any mistake it might make including a mistaken decision to sentence a defendant to death, would be corrected by the trial judge. The defendants argued on appeal: "May we suggest that both the power of the trial judge to set aside verdicts, and his power to grant probation are subject to very definite limitations which were not explained to the jury. . . ."²⁷⁴

The Supreme Court, in rejecting this argument, relied on the fact that although the defense lawyers objected to the court's remarks, they did not move to discharge the jurors who had heard the offending instruction, nor did defense counsel exhaust their peremptory challenges.²⁷⁵ The Supreme Court of Illinois stated:

As we have seen the only remarks objected to were those herein quoted, and it is evident that the jury could not have construed them as having application to this case. Likewise it is apparent from the reading of the statements of the court with the reference to the right of the court to set aside the verdict, that they related to those cases in which the jury has nothing to do with the punishments and would be so construed by the jury. We are of the opinion, therefore, that the statements made could not have prejudiced the plaintiffs in error.²⁷⁶

This argument, perhaps the strongest one on appeal, would have most certainly prevailed today. In fact, as the Supreme Court of Illinois conceded, the judge did misstate the law as it applied to death penalty cases.²⁷⁷ Neither at the trial nor at appeal did the State argue

²⁷³ *Id.*

²⁷⁴ Petition for Rehearing 3 (Mar. 18, 1930) (on file with author).

²⁷⁵ *Fisher*, 172 N.E.2d at 755.

²⁷⁶ *Id.* at 746.

²⁷⁷ *Id.*

that the judge properly stated the law. Moreover, in this case, because of its seriousness and the degree of public attention it received, the judge could not possibly have contemplated overturning the jury's death sentence. Why he gave those instructions remains a mystery.

The trial record does not include reference to what we would now call "mitigation."²⁷⁸ There was no separate sentencing hearing. The jury was simply instructed that after a finding of guilty, it could impose a sentence of death, a sentence of natural life, or a sentence of a fixed term of years.²⁷⁹ A simple verdict form gave the jury those options.²⁸⁰ In closing argument, the prosecutor made little reference to the criminal backgrounds of the defendants, although each, except for Jenkins, had criminal records. Instead, Brooks contrasted the lives of the defendants with those, like himself, had marched off to World War I:

Gentlemen, do you think that I regard life lightly? If you do, you are mistaken. I have seen too much of death. I do not regard life lightly. But I say when four or five men sit in a room and examine banks and then come back again and then decide which one they are going to attack and they take a sawed off shotgun and five pistols and they go in there and say, 'I will send to the death any man that stands in my way,' they forfeit the right to live that has been paid for by the decent sons of honest mothers of this state.²⁸¹

It is clear that this argument in aggravation was designed to contrast the conduct of the defendants to the men who served their country in World War I. The implication was clear in this argument—not only had the defendants not served their country in war, but they had also been ineligible to do so because of their criminal activities, or because they were otherwise unfit for military duty. No objection was raised at trial or on appeal to this argument by Mr. Brooks.

²⁷⁸ See *Lockett v. Ohio*, 438 U.S. 536 (1978) (requiring individualized consideration of mitigating factors); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that courts below erred in refusing to consider evidence in the defendant's background as a mitigating factor).

²⁷⁹ *Abstract*, *supra* note 64, at 492.

²⁸⁰ Jury Verdict Form (on file with author).

²⁸¹ Brooks referred to his own World War I experience: "I have marched with them [men, who unlike the defendants, served their country] bowed down with muddy pack and muddy rifle slung on their backs. And I have crawled with them from shell hole to shell hole. I have been with them when the hours of night time have seemed like years and the days seemed like decades . . . I have seen them offered, seventeen or eighteen years old, on the altar, and somehow I just can't help but feel that they are kneeling at the feet of Columbia, 155,000,000 human souls, the greatest group of organized society in the world, with her blessing, and I see Officer French in peace time, just as brave." *Abstract*, *supra* note 64, at 468, 480.

Only Brown's record was before the jury when it returned verdicts sentencing Brown, Shadlow, and Fisher to death. This was because Brown took the stand and was impeached with his felony convictions. Although Jenkins took the stand, he had no felony convictions.

Brooks argued that the defendants were dangerous, based upon their conduct during the robbery:

What do you think of the life of the warden of any penitentiary at the hands of Brown and Shadlow²⁸² if they should hope to escape at all? Those men that will move on that fortress of the bank with its alarms, with its arms, with its policemen, in daylight on the busiest crossroad in the world, where the plate-glass windows are open to the view of all, what do you think of the nerve of men like that? Are you going to ask another man to risk his life at their hands? Or are you going to raise your arm and say, 'this is the reckoning day for men that defy every institution of the state that allows us the opportunity to raise our young in an honest way.'²⁸³

Finally, Brooks asked the jury to be no less brave than French, and informed the jury that it was their duty to protect the public by ensuring the deaths of the defendants:

French, that colored man, that colored man, the best of his race, I salute you, because I believe that there is no distinction in this country between black and white. If these were white men, I would say the same thing. I can say to you gentlemen, it is a sad day when we can't have twelve men of that great mass of humanity that will stand up and say that guns must stop barking at the doors of our homes; that guns must stop barking at the vaults of the banks, to which the church, and the lodge and the home, and the market, and the little humble boy who sells his papers or mows lawns and takes his pennies there for safekeeping, I tell you honestly I share this responsibility with you, and I am not asking you to do one thing to relieve me of the responsibility. It is mine in the name of the state. I have marched for this state to my death, and I am here today to fight for her in a legal way.²⁸⁴

Jenkins was the only defendant for whom there is some documentation concerning his background. This is because Jenkins survived in prison to make repeated applications for clemency. Jenkins' 1946 petition for release on parole stated that he worked in Kansas

²⁸² Brooks did not include Jenkins in the category of dangerous defendants, thereby perhaps suggesting that Jenkins did not deserve to die, confirming the allegation that there was a deal made between the prosecutors and Jenkins in return for Jenkins' testimony at his trial, and in return for testifying against Hare.

²⁸³ *Id.* at 469.

²⁸⁴ *Id.* at 482.

City, Missouri for a meat packing firm from 1916–1918, and that from 1918 to 1920 he worked for himself selling coal and wood. From 1920–26 he worked as a taxi cab driver in Kansas City. Thereafter, he moved to Detroit, got married, and became an auto mechanic.²⁸⁵ In his 1946 clemency petition, Jenkins alleged that he was “enticed into entering the scheme for the robbery of the bank, due to his dire financial matters at home. He was naïve enough to heed the pleas of the others involved, after being assured that no violence would occur.”²⁸⁶ He intended to serve only as a lookout and did not share in the proceeds of the robbery “as his conscience would not allow him to touch any of the ill-gotten gains.”²⁸⁷

Testimony that we would now refer to as “mitigation evidence” was presented on behalf of the condemned defendant after they were sentenced. This evidence was presented to the parole and pardon board and to the Governor in an effort to convince the State not to execute the defendants. Several stays of execution were granted after it was alleged that the defendants were not mentally fit to be executed.

The statute governing fitness to be sentenced provided:

A person that becomes lunatic or insane after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the lunacy or insanity. If, after verdict of guilty and before judgment pronounced, such person becomes lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judgment and before execution of the sentence, such person becomes lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all of these cases, it shall be the duty of the Court to impanel a jury to try the question whether the accused be, at the time of impaneling, insane or lunatic.²⁸⁸

These petitions were filed after the Supreme Court of Illinois affirmed the Fisher, Shadlow, Brown convictions on direct appeal. On July 31, 1930, Lofton wrote the Department of Public Welfare seeking the appointment of a doctor to examine Fisher. He said:

²⁸⁵ Melvin Jenkins’ Application for Executive Clemency (Dec. 3, 1946) (on file with author).

²⁸⁶ *Id.* at 3.

²⁸⁷ *Id.*

²⁸⁸ Jury Instruction Given in Leon Brown’s Sanity Hearing 2 (July 24, 1930) (on file with author).

Fisher is completely paralyzed from the nipple line down and has been in this condition for the past several months. Judge Trude indicated that he would appoint two alienists of the defense to be paid for by the state, but then found that he was without power to do so.²⁸⁹

Fisher's lawyer also filed a document in the Circuit Court of Cook County stating:

Lafon Fisher, has since the entry of the judgment aforesaid against him, has become and is now lunatic or insane, and has not sufficient intelligence to realize or understand that he is under sentence of death, and must suffer the same unless he shall show some sufficient cause why the punishment ought to be postponed or not executed.

Both of his legs are completely paralyzed; that on a number of occasions his legs would jump like one in a spasm and he was unable to control them; that your petitioner is informed and believes that Lafon Fisher's spinal chord has been crushed, and that he is suffering from an organic disease of the central nervous system.

Lafon Fisher, has stopped your petitioner from talking to him, saying that persons were listening, when it was apparent to your petitioner that there was no one near his cell except your petitioner, and that he stated to your petitioner that "they" were keeping him helpless to prevent him getting out.²⁹⁰

The *Chicago Defender* said of the attempts to block the executions:

For the eighth time the three members of the Franklin bank robbery gang under death sentence for the murder of Martin French, killed during a robbery of the bank on January 18, 1929 have eluded the beckoning arms of the electric chair . . . Attorney Richard E. Westbrooks, counsel for Leon Brown, the third member of the gang, is still leading the fight to save the men from death by electrocution and to have them committed to an asylum for the criminal insane.

Attorney Joseph B. Lofton, who has appeared for Fisher throughout the case has fought one of the most brilliant court battles of his career. He and attorney Westbrooks, who has employed every means known to law to save his client, have fought side by side.

²⁸⁹ Letter from Joseph Lofton to the Department of Public Welfare (July 31, 1930) (on file with author).

²⁹⁰ Petition of James Fisher to Honorable Judges of Criminal Ct. of Cook County 1-2 (on file with author).

Attorney Westbrook, whose career dates back to 1910 and who is a veteran of many bitter court battles, declared that the fight to save Brown from the chair is his greatest effort. It involves the right of a human being and, like Mr. Lofton and Attorney L. Picquette, who recently entered the case in the interest of Shadlow, declared that he will fight on until the end.

Attorney John L. Fogle, who represented Shadlow during previous trials, retired from the case after filing the insanity petition a month ago.

Attorney Lofton, Mr. Westbrook, and Mr. Picquette, who are now serving without pay, announced that they will spend their own money, if necessary to see that their clients are properly protected and given everything that the law allows.²⁹¹

Fisher, Brown, and Shadlow were executed, Shadlow first, and then Fisher. Brown, who claimed that he was innocent, mounted a campaign, led by Rev. Rosebrough of the Moody Bible Institute, to save his life. The campaign was based on Brown's claim of actual innocence. Rev. Rosebrough and his followers claimed that Brown was innocent. They provided statements from Leonard Shadlow and from Stephen Dixon, which stated that Brown had nothing to do with the robbery.²⁹² To counter this campaign, the trial court judge and a banker's association filed letters with the Board of Pardon and Paroles objecting to a commutation of sentence.²⁹³ Despite the intervention of leading citizens on behalf of Brown, Brown was executed.²⁹⁴

IV. CONCLUSION

What do we learn from this examination of Cook County's criminal justice system in 1929?

The criminal justice system of 1929 was beset with many of the same problems we face in the modern day. Crime was perceived to be on the rise. The police and the courts were under pressure to perform more efficiently. Community groups and bar associations worked tirelessly to improve the systems as demonstrated by the publication of the *Survey*. Although there was not the level of discomfort with the death penalty in 1929 as there is today, the doubts raised by

²⁹¹ *Franklin Bank Killers Get Another Stay*, CHI. DEFENDER, Aug. 23, 1930, at 2.

²⁹² Letter from Rev. Chester Rosebrough to the Board of Pardon & Parole (July 8, 1930) (on file with author).

²⁹³ See Letter from Judge Robert E. Gentzel to the Illinois Board of Pardons and Paroles (Sept. 19, 1930) (on file with author).

²⁹⁴ Certification of Execution by Sheriff John E. Traeger of Cook County (Nov. 28, 1930) (on file with author).

Brown's guilt remind us of more recent campaigns on behalf of defendants who have asserted their innocence. The work done by those who wrote the *Survey* was a part of a long tradition of citizen participation in justice system reform. The most recent of this tradition is *The Report of the Illinois Governor's Commission on Capital Punishment*, which identified substantial areas for improvement in the administration of justice throughout the State of Illinois.²⁹⁵

An examination of the *Fisher* trial also gives us a sense of how the procedural rules that govern the modern-day criminal trial have developed and why many of these rules are necessary to protect the integrity of criminal adjudications. The issue of what rules should govern police interrogations of suspects, the impact of pre-trial publicity, the need for pre-trial discovery, the need for pre-trial hearings on the admissibility of confessions, and the need under certain circumstances for separate trials were raised without success by the defendants' lawyers. The defense lawyers who participated in the *Fisher* trial had a vision of how to make the trial of a criminal case more fair.

The defendants' lawyers objected to the introduction of their clients' coerced confessions and sought, unsuccessfully, pre-trial hearings on their admissibility. At trial, when a hearing regarding alleged coercion was held outside of the presence of the jury, the lawyers challenged the State's assertion that the defendants were not abused by police. The assertions that the defendants made in this case about the way in which they were treated by the police have been made repeatedly in other cases since 1929. As noted above, only now are courts beginning to take a closer look at how to resolve the contest of credibility between defendants who claim that they have been abused and police and prosecutors who deny that defendants were coerced.

The lawyers objected to the fact that they were not given adequate discovery. Their most well-taken objection was that they were not provided with the statements of their clients until after the State offered their clients' confessions into evidence. This assertion was made with great clarity and skill at both the trial and appellate levels. No reasons were given by the trial court or the Illinois Supreme Court as to why at least this measure of discovery should not have been granted, other than that providing defendants access to their confessions before they are introduced into evidence was unheard of.

²⁹⁵ STATE OF ILL., REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002).

The need for separate trials was also a key issue. Although only one defendant made a motion for severance before trial, Fisher, Shadlow, and Brown all moved for a mistrial after Jenkins, in his testimony and in his lawyer's closing argument, clearly pointed his finger at his co-defendants. The then existing rule that the co-defendants' lawyers could not cross-examine a testifying co-defendant made the need for a severance all the more acute. Interestingly, however, the defense lawyers made no motion to sever the cases on appeal, nor did they file separate briefs on behalf of their individual clients.

No thought was given to presenting mitigation evidence on behalf of the defendants. No statute required a hearing in aggravation and mitigation. The jury was obligated to consider whether to sentence the defendants to prison or death with no guidance. In making this decision, the jury had no information about the backgrounds of any of the defendants, except for the criminal record of Brown who was impeached with his prior convictions. Only after the trial, when the defense lawyers tried to save their clients' lives by claiming that they were unfit to be executed, did information about the defendants' backgrounds come to light.

The Fisher case also teaches us about the power of lawyering. Two able lawyers, Charles Bellows and Wayland Brooks, prosecuted the case. While one could quarrel with some of the tactics used by the prosecution, especially the extent to which it relied upon arguably coerced confessions and upon pre-trial publicity to obtain a jury likely to convict, one cannot read the record without being impressed by the technical skills displayed by the prosecutors in planning and carrying out the prosecution.²⁹⁶ Brooks' closing argument was a display of rhetorical skill that we do not often see in courtrooms today.

²⁹⁶ Another interesting fact is that his trial was one of the first in which ballistics evidence was introduced. *Abstract, supra* note 64 at 337-342. The testimony of Calvin Goddard tied the bullets found in the body of Marvin French to the weapons recovered by the police. *Id.* at 337-381. A Smith & Wesson pistol, the gun that fired one of the fatal shots, was found in an ash heap in the basement of the house in which the defendants were arrested. *Id.* at 478. The shotgun shells found at the scene of the crime were tied to the shotgun found in the car that was allegedly driven by the robbers. *Id.* at 352. The defense lawyers seemed completely unprepared for this testimony and unsuccessfully challenged it on appeal, claiming that the testimony was "novel" and should not have been admitted. (The Supreme Court of Illinois rejected the defendants' contention: "We are of the opinion that in this case, where the witness has been able to testify that by the use of magnifying instruments and by reason of his experience and study he has been able to determine the condition of a certain exhibit, which condition he details to the jury, such evidence, while the jury are not bound to accept his conclusions as true, is competent expert testimony on a subject properly one for expert knowledge." *Fisher*, 172 N.E. at 754.)

The zeal and dedication of the defense lawyers was also apparent. The efforts of the defense were particularly noteworthy on appeal and during the sanity and clemency process. Richard Westbrook, in particular, pursued every available option to save Leon Brown's life. Perhaps this was because he believed that Brown was innocent. After Dixon was arrested and sentenced to prison, he asserted that Brown had nothing to do with the robbery. Brown was the only defendant to testify.

Finally, the lack of even-handedness in the application of the death penalty must be noted. Dixon, the man who the State eventually conceded fired the shotgun blast that killed French, the Franklin Trust security guard, received a life sentence in return for his guilty plea, while Shadlow, who the State seemingly incorrectly claimed at trial fired the shotgun, was executed. Brown and Fisher, whose roles in the actual shooting of French were never made clear, were executed. Herbert Hare, the man who allegedly planned and financed the robbery, was given a life sentence.

APPENDIX A

STATEMENTS FROM LEON BROWN AND LAFON FISHER

January 18, 1932

Statement of Leon Brown, 3033 Michigan Ave. Statement made in Office of Deputy Commr. of Dets. John Stege, Jan. 19, 1932, at 9:45 p.m.

Present: Deputy Commr. of Dets. John Stege.
Chas. A. Ballows, Asst. State's Attorney.
Frank A. Sheeder, Court reporter.
Harry J. Solomon, 310 S. Michigan Ave.
Robert A. McLean, 3431 S. Michigan Ave.
John R. French, 3431 S. Michigan Ave.
Capt. Fred J. Armstrong, Michigan State Police.
Lieutenant Wm. J. Gussack, Squad 35-B.
Prism. Jos. Sullivan,

Questioned by Asst. State's Attorney, Ballows.

Q. What is your name? A. Leon Brown.
Q. Where do you live? A. 3033 Michigan.
Q. How old are you? A. 28.
Q. Where do you work? A. Not working.
Q. Since how long? A. 2 mos.
Q. Where did you work? A. City of Chicago.
Q. Doing what? A. Night watchman.
Q. How long did you work as a night watchman for the city? A. Close to a year or 10 mos.
Q. What did you do before that? A. Head porter for Illinois Steel Co.
Q. Married? A. Yes sir.
Q. What is your wife's name? A. Virginia Brown.
Q. Do you know Leonard Shallow? A. Yes - 1 month.
Q. How long do you know Leonard Fisher? A. 4 or 5 days.
Q. How long do you know Melvin Jenkins? A. About 2 mos.
Q. How long have you known Steve? A. 4 or 5 days.
Q. What is Steve's last name? A. I don't know.
Q. You know you are in the Detective Bureau? A. Yes.
Q. My name is Ballows, Asst. State's Attorney & this is Mr. Sheeder, Court reporter, this is Dr. McLean, Mr. Solomon is over there, Mr. McLean, and Mr. Saunders. You know you are here in connection with the robbery of the Franklin Savings Bank and the killing of the police officer Martin A. French?
A. Yes sir.
Q. Now anything you say here may be used for or against you. Realizing that do you want to tell the truth?
A. I sure do.
Q. While you've been in the custody of the police, no one abused you did they? A. No sir.
Q. Nobody promised you immunity? A. No.
Q. You are willing to tell the truth? A. Yes sir.
Q. When did you first plan the robbery of the Frank Trust & Savings Bank?
A. The day before it was pulled. Two days.
Q. When did you first talk about robbing the Franklin Trust & Savings Bank?
A. 2 days before.
Q. Who did you talk about it?
A. Leonard Shallow, Fisher, Melvin Jenkins and Steve.
Q. Where did you talk about this?
A. At 3341 Caban Avenue.
Q. Whose apartment was that?
A. I don't know.

continued Leon Brown

